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Supreme Court of the United States

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS – N. PROVIDENCE, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, and UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Rhode Island bans chain stores and franchising from only one segment of its economy – liquor stores. It also precludes those who operate any retail or wholesale businesses in another state from operating a liquor store within its borders. Additionally, Rhode Island bans certain communications directed by retailers towards their customers that Rhode Island deems to be "indicia" of a chain store or franchise, including joint advertising and the use of a similar trade name. The First Circuit sustained these restrictions, but not because the products being sold include alcoholic beverages. Instead, the restrictions were upheld under the State's police power to enact economic legislation.

Accordingly, the questions presented are:

1. Whether a State may, consistent with the Commerce Clause, close its market to chain stores and franchising without establishing a relationship between that ban and achieving a legitimate governmental objective?

2. Whether a state may, consistent with the Commerce Clause, preclude a business from operating within its borders because that business also operates in another state?

3. Whether a state may ban participation in "coordinated or common advertisement" and the use of similar trade names without justifying those restrictions under a First Amendment analysis?

RULE 29.6 STATEMENT

Petitioners have no parent company and no publicly held company owns 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reproduced as Appendix B (App. 3-28), is reported at 481 F.3d 1 (1st Cir. 2007). The transcript of the oral decision of the District Court following trial, reproduced as Appendix C (App. 27-49), is unreported.

BASIS OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 20, 2007 (App. 3). A timely petition for rehearing *en banc* was denied on April 19, 2007 (App. 1). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause and First Amendment to the Constitution of the United State are reproduced in the Constitutional and Statutory Addendum at App. 81.

The relevant sections of Rhode Island's liquor control statute are also reproduced in the Constitutional and Statutory Addendum at App. 81 through 88.

STATEMENT OF THE CASE

I. Facts

The Rhode Island statutory scheme at issue in this case exemplifies a national effort to protect local businesses by restricting entry of chain stores into local markets. Considerable attention has been paid to local efforts to ban "big-box stores" such as Wal-Mart. Equally contentious have been the efforts by "local first" groups to keep out national and regional retailers.

One group of local retailers that has succeeded in keeping chains and franchises out of its local market is United Independent Liquor Retailers of Rhode Island. In 2004, "United Independent" convinced the Rhode Island General Assembly to amend its liquor control statute to ban franchising and to expand a preexisting ban on chain stores.

Rhode Island's market for the retail sale of alcoholic beverages has been protected from the encroachment of national and regional retailers that has occurred in most markets. Historically, state liquor regulations were viewed by many as exempt from any limitations on the States' authority to regulate interstate commerce.[1] This near complete deference to state controls has left Rhode Island's retail liquor industry isolated and immune to the evolving market forces at play in the rest of the economy.

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[1] Following the repeal of national prohibition, a minority of states adopted a variance of a state monopoly to control the retail distribution of alcoholic beverages. The rest of the States, including Rhode Island, distribute alcoholic beverages through a regulated system of free enterprise. But, as will be demonstrated, the fact that alcoholic beverages were at issue had no bearing on the Court of Appeal's decision that a state may close its market to chains and franchising.

Local liquor stores have not had to compete with larger and more efficient multi-state retailers; and are determined to maintain their advantageous market position.

This sheltered market predictably resulted in low levels of competition and higher prices for consumers. Individual stores lack the capacity or need to advertise, reducing price competition. (C.A. App. 34-35); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996) ("a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market" (footnote omitted)). Additionally, Rhode Island's small liquor stores lack the bargaining power to negotiate lower prices, resulting in wholesale prices in Rhode Island that are typically higher than the retail prices in neighboring states. (C.A. App. 36). Protected from competition with more efficient large retailers, Rhode Island liquor stores have been able to prosper, at the expense of the consumer, despite running inefficient businesses. (C.A. App. 172).

The Petitioners upset this sheltered marketplace when they brought the economic efficiencies of a regional franchise into Rhode Island. (C.A. App. 110, 248-49). The Petitioners represent the first entry into Rhode Island's retail liquor market by a multi-state business using economies of scale to deliver lower prices and greater competition. The Wine & Spirits Retailer's franchise began seven years earlier in Massachusetts.[2] Because of Rhode Island's anti-chain store provision, Wine & Spirits Retailers could not expand directly into Rhode Island. (C.A. App. 36). However, Wine & Spirits Retailers was

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[2] Although Wine & Spirits Retailers operated exclusively in Massachusetts at the time, its corporate headquarters was and remains in Rhode Island.

able to sell its successful business model and trade name into Rhode Island as franchises.[3] These franchises operated in Rhode Island, with the knowledge and approval of the State for seven years prior to the adoption of the 2004 Amendment.

Eventually eleven Rhode Island liquor stores would become franchisees.[4] (App. 54). Not surprisingly, existing stores viewed the appearance of a regional retailer as a threat to their profits and market share. Rhode Island's liquor stores, through United Independent Liquor Retailers of Rhode Island, sought and obtained legislative intervention in the form of the 2004 Amendment to Rhode Island General Laws, §3-5-11 (App. 86-87) (expanding the reach of the ban on chain stores) and the addition of a new section, §3-5-11.1 (App. 87-88) (adding a ban on franchising). The 2004 Amendment also prohibited a number of activities that Rhode Island has deemed to be indicia of chain stores and franchising. These restrictions reach communications directed by the retailer at its potential customers, including a ban on liquor stores participating in joint advertisements and a ban on the use of similar trade names. Liquor stores engaging in these practices face sanction even if they are not otherwise part of a chain store or franchise operation. (App. 86).

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[3] Wine & Spirits divides its franchisees into two groups that follow slightly different business models. Most of the stores operate under the trade name "Douglas Wine & Spirits," including the three stores that participated in this litigation. A smaller number of the franchisees operate under the trade name "Peoples Liquor Warehouse," which follow a big box wholesaler model. For sake of simplification, all of these stores are collectively referred to herein as "Douglas" stores.

[4] This group included one store that had previously appeared before this Court to successfully challenge another of Rhode Island's restrictions on advertising by retail liquor stores. *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996).

In order for Rhode Island to keep out national and regional retailers effectively, it must target business activities occurring outside of its borders. To be effective, the restrictions must bar any business from Rhode Island's retail liquor market if that business also operates in any other states. The Intervenor below aptly explained the reason for the inclusion of the extraterritorial reach in the law it helped to draft:

> if . . . out of State retail branches were *excluded* from the chain store count, . . . a Costco could then use its national chain power to open a mega-store in Rhode Island and drive out the independent liquor retailer.

Appellee UILR's Memorandum of Law to the First Circuit, p. 8. Counsel for the State agreed that this extraterritorial reach was necessary:

> If it were the other way around, we would be facing an argument that it discriminates against in-state license holders and that they are limited to one license while someone from Massachusetts could have four. I believe that would be what we would hear about if that happened.

C.A. App. 337-38.

Under these restrictions, those who wish to participate in Rhode Island's retail liquor market may not own liquor stores, grocery stores or even shoe stores in other states.

> [Liquor store] Licenses . . . shall not be granted, issued, or transferred to or for the use of any "chain store organization," which term shall consist of any chain of retail or wholesale business or business organizations . . . including, without limitation, grocery stores, markets, department stores, and convenience stores, as well as retailers of alcoholic beverages, and

> which include chains in which one or more stores are located outside of the state.

R.I.Gen.L. §3-5-11(a) (App. 86). Thus, Rhode Island not only regulates economic activities within its own borders, it restricts economic activities occurring completely in other states, even when the out-of-state economic activities are wholly unrelated to the liquor industry. It does this to protect local businesses from the need to compete against national and regional retailers that could use their size and market efficiencies to compete effectively against those local businesses. (C.A. App. 76-78, 342).

Even if there were only one Douglas store in Rhode Island, that store would be in violation of §§3-5-11 and 3-5-11.1 because there are Douglas stores operating outside of Rhode Island. Therefore any argument that Rhode Island's ban on chain stores and franchising targets monopolistic behavior is specious.

II. Procedural History

Wine & Spirits Retailers, Inc. and its owner John Haronian brought this action in the U.S. District Court for the District of Rhode Island challenging the constitutionality of these restrictions. They were later joined by three of the franchisees as additional Plaintiffs.

Petitioners challenged the constitutionality of R.I.Gen.L. §§3-5-10, 3-5-11 and 3-5-11.1 as violating the Commerce Clause and the First and Fourteenth Amendments to the Constitution of the Untied States. The jurisdiction of the District Court was invoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1331 (federal question) and 1343 (deprivation of civil right).

The original Defendants consisted of the State of Rhode Island and the Associate Director of the Rhode Island Department of Business Regulation – the official

tasked with enforcing the challenged provisions.[5] United Independent Liquor Retailers of Rhode Island intervened to defend the 2004 Amendment, which it had lobbied for and helped to draft.

A trial was held in July of 2006. Following the trial, the District Court delivered an oral decision in the State's favor on all counts. (App. 27-49).

The U.S. Court of Appeals for the First Circuit upheld the decision of the District Court (App. 3-26) and a timely petition for *en banc* review was denied on April 19, 2007 (App. 1).

In sustaining the District Court's decision, the Court of Appeals ruled that the extraterritorial reach of §3-5-11(a)(1), banning liquor licenses to chain stores "which include chains in which one or more stores are located outside of the state" (App. 86), does not constitute impermissible regulation by Rhode Island of commercial activity that occurs wholly outside of its borders. (App. 23).

The Court of Appeals ruled that the State acted within its power to regulate economic activities when it banned chain stores and franchising. The Appeals Court concluded that, because the statutes prohibit both in-state and out-of-state chain stores and franchises, the Commerce Clause is not violated. (App. 21-22).

The Court of Appeals concluded that joint advertising is not protected by the First Amendment. (App. 7-8); holding that the placement of joint advertisements is conduct, not speech and therefore is not protected by the First Amendment. (App. 8) ("The statute at issue here merely proscribes conduct – the launching of advertisements resulting from pre-agreed commercial

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[5] The State of Rhode Island has not asserted any defenses under the Eleventh Amendment in this matter.

strategies. Such a ban is not a ban on commercial speech").

While acknowledging that trade names do constitute commercial speech (App. 10-11), the Court of Appeals held that the "Douglas Wine & Spirits" trade name is deceptive because it suggests the existence of a chain store. (App. 13). The Court of Appeals made this finding despite the absence of any evidence that members of the public are "deceived" by the use of the name Douglas Wine & Spirits in any material way. (App. 13). The Court also concluded that the inclusion of the disclaimer "All stores independently owned and operated" does not remove any risk of deception regarding the existence of a chain, placing the trade name within the scope of protection of this Court's commercial speech jurisprudence. (App. 14).

The fact that most of the products sold in the stores at issue are alcoholic beverages was not relevant to the Court of Appeal's decision. Rhode Island stipulated that it would not defend the challenged provisions based on an impact on temperance (App. 19); and the Court of Appeals, while briefly noting the Twenty-first Amendment in the introduction to its Commerce Clause analysis, did not include any discussion of the State's power under the Twenty-First Amendment in the body of that discussion. (App. 14-25). One could substitute bookstores – if Rhode Island's booksellers had been able to amass sufficient influence with local political interest to get similar protectionist legislation passed for their industry – without impacting the analysis.

III. Summary of Reasons for Granting the Writ

Petitioners, respectfully pray that a *writ of certiorari* issue to correct the decision entered by the United States Court of Appeals for the First Circuit and resolve a conflict between the First and Fifth Circuits on the question of what commercial speech is protected by the First Amendment and a conflict between the First,

Second, Sixth and Fifth Circuits on the question of what burden a State must satisfy before it may regulate commercial speech. In addition, this Petition presents a case of national importance because the Court of Appeals held that states, acting under their power to regulate economic activities, may ban national and regional retailers from doing business within their borders.

REASONS FOR GRANTING THE WRIT

I. Rhode Island's ban on chain stores and franchising

Rhode Island's liquor regulatory scheme is designed to ensure that no outsiders enter the Rhode Island liquor market. (§3-5-10 at App. 83, §3-5-11(a) at App. 86, Stipulation of the Parties No. 124 ("Under the requirements of §3-5-10 all Class A licenses must be held by Rhode Island residents or Rhode Island corporations")). Rhode Island's liquor regulatory scheme also ensures the profitability of licensed wholesalers and retailers through minimum pricing requirements and restrictions on business practices that permit some liquor stores to become more competitive than others. (§3-5-11(b) at App. 86). Businesses practices that foster competition are limited or prohibited, including advertising (§3-5-11(b)(1)(iii) at App. 86) and efforts to negotiate bulk discounts (§3-5-11(b)(1)(i) at App. 86). Stores cannot adopt business efficiencies developed by other retailers (§3-5-11(b)(1)(iv) at App. 86; §3-5-11.1 at App. 87-88).

The local stores operating under this protective cocoon have prospered without the need to adopt business efficiencies. The 2004 Amendment ensures that that protected market will continue by banning any store that meets the definition of a "chain store operation" from holding a liquor license. This definition specifically bars national and regional retailers (§3-5-11(a) at App. 86), as

well as anyone who does any retail or wholesale business in other states, regardless of the form (*Id.*). After the 2004 Amendment, the Rhode Island market is even protected from those businesses that associate with out-of-state businesses. (§3-5-11(b)(1) at App. 86, §3-5-11.1 at App. 87).

II. Other efforts to exclude national and regional retailers

The effort to exclude national and regional retailers in order to protect local businesses sustained by the First Circuit is not limited to the retail sale of alcoholic beverages. While many of these efforts are based on zoning restrictions used to exclude big box stores, these zoning restrictions are not the type at issue in this matter. The size and location of the liquor stores operated by regional retailers, like the Douglas stores, are similar to the size and locations of the local competitors, making zoning restrictions an ineffective method of excluding chains and franchises in this context. Instead, efforts to protect local business, like the legislation at issue here, must be based on the store owner's affiliations, rather than on size or location of the stores.

The fight against national and regional retailers sometimes takes on a messianic tone – as local business owners seek to shelter themselves from the increasing encroachment of national and regional retailers. These local retailers see competition against national and regional retailers, with their greater marketplace efficiencies, as a threat to the survival of their businesses.

Typical of this is the Lector often cited by local first groups: DECLARATION OF INDEPENDENTS: HOW TO WIN THE FIGHT AGAINST THE COLONIZATION OF OUR LOCAL COMMUNITIES BY BIG-BOX RETAILERS (http://www.changethis.com/pdf/28.03.DeclarationIndependents.pdf (last visited July 17, 2007)), which tries to recast the American Revolution as a struggle between those favoring "[h]omegrown locally-made" against the large

retailers personified by the East India Company. Justification for the exclusion of national and regional retailers takes on a dire tone. For example, the American Independent Business Alliance warns that chains of bookstores will reduce freedom of speech in America. ANTITRUST, BOOKS, AND IDEAS: HOW CHAIN BOOKSTORES CONTROL THE BOOK INDUSTRY, THE FIRST AMENDMENT AND MORE, http://amiba.net/pdf/ antitrust_books_ ideas.pdf (last visited on July 17, 2007). Others echo this claim. DECLARATION OF INDEPENDENTS, p. 8 ("Communities that possess a degree of economic self-reliance more competently care for themselves, while concentrated economic power threatens social well-being and even democracy"). Opponents go as far as to blame a wide range of evils on the failure to favor local businesses over national and regional retailers:

> No matter what keeps you awake at night—whether it's the melting ice caps, peak oil, the threat of terrorism, the power of corporations, or the demise of civic engagement—the solution to all of these problems lies in rebuilding our local economies.

DECLARATION OF INDEPENDENTS, p. 16.

Examples of other bans enacted include:

The City of Coronado, California imposes special permitting requirements on chains and franchises under its "formula business" ordinance. Under Coronado's ordinance, a chain or franchise will only be approved if the approval "will contribute to an appropriate balance of local, regional or national-based businesses in the community." Coronado Mun. Code, §86.55.370(C)(3) (App. 90). Maintaining this "balance" in the number of local and national-based businesses necessitates restricting the number of national and regional based businesses in the City.

Sausalito, California has adopted a similar provision, which also denies access to "Formula Retail

establishment[s] [unless they] will contribute to an appropriate *balance of local, regional or national-based businesses*." Sausalito Mun. Code, §10.44.240(D)(4). (App. 103) (emphasis added).

San Francisco prohibits chain stores and franchises from certain sections of the city entirely and imposes extra notification and hearing requirements on chains and franchises to be located in the rest of the City. San Francisco Mun. Code, §§703.3(e); 703.4(b). (App. 97, 100). San Francisco identifies a purpose of this restriction as protecting against the economic trends towards the proliferation of national business.

> [T]he unregulated and unmonitored establishment of additional formula retail uses may . . . skew the mix of businesses towards *national retailers in lieu of local or regional retailers.*

San Francisco Mun. Code, §703.3(a)(9). (App. 95) (emphasis added).

Sections 139-1, *et seq.* of the zoning bylaws for the town of Nantucket, Massachusetts bans businesses that share any two of the following characteristics: standardized products; shared trademarks; standardized color scheme used in the interior of the establishment or standardized uniforms for employees from certain sections of the town. (App. 91). The stated purpose for this ban is to "address the adverse impact of *nationwide*, standardized businesses on Nantucket's downtown area." §139-12(H)(2) (App. 93) (emphasis added).

Returning to the statutory scheme at hand, the decision of the First Circuit gives a green light to communities across the country to enact similar legislation to protect their local businesses.

III. Argument

A. Restraint of the free flow of interstate commerce

The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States." *U.S. Const. Art. I, § 8, cl. 3.* It serves as a "self-executing limitation on the power of the States to enact laws imposing substantial burdens on commerce." *Dennis* v. *Higgins*, 498 U.S. 439, 447 (1991). This negative implication known as the "dormant" Commerce Clause, prohibits states from enacting regulations that interfere with interstate commerce—particularly those that benefit local commercial interests by burdening out-of-state competition. *See New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273-74 (1988). Its purpose is to "preserve a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 279 (1997).

In this case, the Rhode Island's blanket exclusion of nonresidents and anyone who does business in other states from its retail market for alcoholic beverages is a textbook affront to the pro-competitive principles advanced by the Commerce Clause.

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. *Du Mond*, 336 U.S. 525, 539 (1949).

Rhode Island's statutory scheme interferes with the free flow of goods in three ways. First, Rhode Island regulates the economic activities that individuals and entities may engage in other states. Second, Rhode Island bars out-of-state businesses from entering its market. Third, it bars the sale of franchises into Rhode Island.

1. Rhode Island's franchise and chain store ban impermissibly regulates extraterritorially by restricting how individuals and entities may engage in economic activities in other states. Rhode Island closes its retail liquor market to anyone who engages in any out-of-state retail or wholesale business. §3-5-11(a)(1) (App. 86-87) (prohibiting any "retail or wholesale business or business organizations . . ., which include chains in which one or more stores are located outside of the state" from holding a liquor license).

Those who have liquor licenses in Rhode Island, like the Petitioner stores, are forbidden from opening any other form of "retail or wholesale business or business organizations" in any other state. Someone who owns liquor stores, or any other businesses, in another state, like Petitioner John Haronian, cannot obtain a Rhode Island liquor license unless he first relinquishes his out-of-state businesses. This regulation of economic activities in other states is a *per se* violation of the dormant Commerce Clause. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 582 (1986) ("Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce"). In *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989), this Court found that because Connecticut's price-affirmation statute had the "practical effect" of impacting how a wholesaler would set prices in other states, it regulated extraterritorially and was *per se* unconstitutional. 491 U.S. at 337. Section

3-5-11(a) has more than the "practical effect" which so offended the Court in *Healy*; it directly prohibits economic activities in other states. An individual or entity that owns a shoe store in California is barred from opening a liquor store in Rhode Island.

Even if there were only one Douglas franchisee in Rhode Island, that store would still be in violation of §§3-5-11(a) and 3-5-11.1 by virtue of its association with the Massachusetts Douglas franchisees.

2. The ban on chain stores and franchising restricts interstate trade into Rhode Island. Wine & Spirits Retailers was prohibited from expanding into Rhode Island because of the preexisting ban on chain stores. Franchising permitted it to avoid the extraterritorial reach of the pre-2004 version of §3-5-11. Independently owned Rhode Island liquor stores were able to adopt Wine & Spirits Retailers' business model and trade name, without subjecting it or them to §3-5-11's requirement that the out-of-state Douglas stores cease operating as a condition of entry into the Rhode Island market. (C.A. App. 36-39; 557). The 2004 amendment redefined the chain store ban – expanding the extraterritorial reach to include franchise or other relationships with businesses located outside of Rhode Island.

Although Rhode Island claims that its ban on franchises and chain stores is neutral in application, it is discriminatory in both its purpose and effect. The restrictions prohibit issuance of retail liquor licenses to chain stores and franchises, without regard to geographic location of the stores. But when §3-5-11 (prohibiting chains) is coupled with the residency requirement of §3-5-10, those two sections effectively close Rhode Island's retail liquor market to out-of-state businesses. (App. 16-17 n. 3, C.A. App. 299-300). This statutory scheme has erected an impermeable barrier around Rhode Island's borders to any outside business that would seek to operate a retail liquor license in that State.

Statutes that are written with neutral language, but which have a clearly discriminatory impact should be reviewed under the strictest form of Commerce Clause analysis. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (invalidating state tax on out-of-state liquor, finding that legislature's reasoning of encouraging and promoting local industry was in conflict the goal of the Commerce Clause).

Although Rhode Island has effectively closed its doors to out-of-state businesses in the retail liquor market (App. 16-17 n. 3, C.A. App. 299-300), the First Circuit did not treat the statutory scheme as discriminatory. (App. 21-22). The Fifth Circuit came to the opposite conclusion of that reached by the First Circuit, when that Court reviewed Texas's liquor licensing scheme. In *Cooper* v. *McBeath*, 11 F.3d 547 (5th Cir.), *cert. denied*, 512 U.S. 1205 (1994), the Fifth Circuit was asked to review the residency requirement for wholesaler liquor licensees. In deciding which level of Commerce Clause scrutiny to apply, the Fifth Circuit noted that since the repeal of prohibition, the State had restricted licenses to Texans (*Cooper*, 11 F.3d at 553), and, therefore, that Court applied the standard for laws that discriminate against interstate commerce.

> The statutory barrier Texas has erected against non-residents who wish to obtain mixed beverage permits results in shielding the State's operators from the rigors of outside competition. This rule subjects such laws to the Commerce Clause's insistence on nondiscrimination.

Cooper, 11 F.3d at 555. Rhode Island not only bars out-of-staters (see §3-5-10 at App. 83), but also bars those who have an interest in any out-of-state retail or wholesale business (§3-5-11(a) at App. 86-87). The Texas statute could not survive this Commerce Clause scrutiny and neither could the Rhode Island statute if the First Circuit had applied the same standard as the Fifth Circuit.

Even if viewed as nondiscriminatory, the challenged provisions would still run afoul of the Commerce Clause by excessively burdening the flow of interstate commerce without a legitimate purpose. The challenged provisions cause higher prices for products within the flow of interstate commerce. (C.A. App. 248-49, 261 (prices increased as a result of the change in the law); C.A. App. 233-34 (99% of the products sold are produced out of state)). This burden is placed on the flow of interstate commerce for the illegitimate purpose of protecting local businesses.

As noted by the Sixth Circuit "[c]ourts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles* v. *Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (applying rational basis test), *citing, City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978) ("where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected"); *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 531-32 (1949) (finding unconstitutional licensing restriction that, in the name of limiting competition, prevented a milk producer from adding additional facilities); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983) (distinguishing between legitimate state purposes and "providing a benefit to special interests"). This Court has previously instructed that states may not preserve local businesses through legislatively increasing prices of goods in interstate commerce. *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-23 (1935).

The First Circuit concluded that states are free to ban chains and franchising if they do so evenhandedly. Since most states are not the home of major chains and franchises, the Panel's decision allows states to ban chains and franchising in the guise of evenhandedness. Although the ban on chains and franchising at issue here

applies to one segment of the marketplace, the State stipulated below that it would not present evidence at trial that this ban on chains and franchising promoted temperance. Accordingly, the First Circuit's decision did not rely on the fact that this ban on chains and franchising involved the sale of alcoholic beverages. Thus, the Court of Appeal's decision stands for the proposition that states may ban chain stores and franchising in any industry.

3. Rhode Island bans the sale of franchises into its State. This Court previously provided an example of a restriction on interstate commerce that would be subject to a virtual *per se* rule of invalidity, which is particularly instructive in this case. "The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia*, 437 U.S. at 624. Rhode Island has erected an absolute barrier to the sale of franchises across its borders in the retail liquor market. (§3-5-11.1 at App. 87-88).

The question was raised by the Court below of why a state would not be free to eliminate franchises as a legally recognized form of business, given that franchises and corporations as legal entities are only creations of state statute to begin with. Rhode Island does not simply repeal the application of its franchise statute to liquor stores. Rhode Island added a list of specific activities that are forbidden, regardless of the corporate formalities of the entities involved. These provisions of §3-5-11(b)(1) separately prohibit, among other activities, "[p]articipation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media"; "[c]oordinated or common planning or implementation of marketing strategies"; or "[a]ny term or name identified as a chain or common entity." §3-5-11(b)(1)(iii), (iv) and (vi) (App. 86). While these relationships between businesses are often

formalized through franchise agreements, such business relationships can exist without that title – a fact acknowledged by the Rhode Island General Assembly when it included the list of prohibited activities in §3-5-11(b)(1) at the same time it enacted the ban on franchising contained in §3-5-11.1.

It is this cross-border business relationship that Rhode Island has eliminated through the §§3-5-11(b)(1) and 3-5-11.1. Therefore, the products within the flow of interstate commerce at issue in this case are not limited to the beverages sold in the Petitioners' stores. As acknowledged by the Court of Appeals, W&SR "engage[s] in the interstate business of franchising package stores." (App. 5). Rhode Island has completely banned the sale of franchises (within one sector of its marketplace).

B. Restrictions on Speech – Use of Similar trade names

While it could be tempting to end the analysis of the Rhode Island statutory scheme with the Commerce Clause analysis, based on the syllogism that if the State can ban chains and franchises, then it surely can ban trade names or joint advertisements that suggest the stores are part of a chain or franchise. Even if the statutory scheme were sustained under the Commerce Clause, the State cannot escape its obligation to justify restrictions on speech independent of its justification for its economic regulations.

> The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct . . . As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

44 Liquormart, 517 U.S. at 512. See also *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U.S. 173, 182 (1999) ("the power to restrict speech about certain socially harmful activities is not as broad as the power to prohibit such conduct").

During the seven years that the eleven Rhode Island Douglas stores have been in operation, they have worked hard to establish a positive name recognition and consumer good will amongst their communities. Section 3-5-11(b)(1)(vi) takes away these names and requires the stores to adopt new names that are more acceptable to the State. (App. 75-80, 86).

The Court of Appeals held that the Petitioners' trade name, while constituting speech, is not protected by the First Amendment on the grounds that it is "misleading." (App. 14-15). The only concern raised with regard to the trade name being "misleading" is the potential that the use of the Douglas name by multiple stores may convey to consumers that the stores are part of a chain or franchise.

> It conveys and, obviously, is intended to convey to consumers the impression that all of the stores are part of a single entity and operate in concert, which if plaintiffs claim [that they have terminated their franchise relationship following the adoption of the challenged provisions] is credited would be untrue and, therefore, misleading.

District Court's Oral Decision (App. 38).

Given that the "misleading" characteristic of the similar names is limited to the risk that consumers may mistake the stores for members of a chain or franchise, then the inclusion of the disclaimer: "this store is independently owned and operated" would eliminate the ***only*** misleading characteristic of the trade name.

Other circuits confronted with restrictions on trade names have concluded that they are protected by the First Amendment even when they can be seen as misleading. These decisions by other circuits follow the teachings of this Court in its treatment of trade names.

1. The speech at issue is neither misleading nor related to a product or service that is illegal. The speech at issue involves the retail sale of a legal product. The statute is the only thing that makes this speech illegal. Running a licensed retail liquor store is not misleading or illegal. Solely by virtue of the challenged statute, it is illegal for the stores to use similar trade names or to use names that suggest the existence of a chain. This bootstrapping approach to justifying a ban on commercial speech by arguing that the speech is illegal because the State has banned that speech, was recently rejected by the Fifth Circuit.

> The threshold inquiry asks whether the speech is misleading or the product or service spoken about is illegal, and here the speech isn't misleading and the product or service itself – bail bonds – isn't illegal. That [the one provision of the challenged statute] itself bans speech doesn't save [the other provisions].

Pruett v. *Harris County Bail Bond Board*, 2007 WL 1632697, *2 (5th Cir., decided June 7, 2007).

The Federal Trade Commission provides a clear definition of what makes a commercial solicitation misleading. In its *FTC Policy Statement on Deception* (appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)), the FTC concluded that three things must be shown before a solicitation is considered misleading. There must be (1) a representation, omission or practice that is likely to mislead the consumer; (2) it must be misleading to a reasonable consumer; and (3) the representation, omission or practice must be *material*. While none of these elements are present in the use of the

Douglas name, the third element is most categorically absent. Rhode Island presented nothing to show that a mistaken belief that stores are part of a chain, would materially impact the consumer.

There is simply no conceivable harm to the public from the use of the name "Douglas Wine & Spirits (all stores independently owned and operated)" – and no evidence of harm was offered or argued.

2. This Court has not yet resolved the question of whether trade names and signs are pure speech or commercial speech. The First Circuit's analysis of Petitioners' trade names was based entirely on the assumption that trade names constitute commercial speech. If the trade names are not commercial speech, then the "misleading" prong of the *Central Hudson* test is inapplicable. *Central Hudson Gas & Electric Corp.* v. *Public Services Comm'n*, 477 U.S. 557, 564 (1980).

"The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *44 Liquormart,* 517 U.S. at 501. Commercial speech is "speech which does 'no more than propose a commercial transaction.'" *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (emphasis added). Although, as acknowledged by this Court, "ambiguities may exist at the margins of the category of commercial speech" (*Edenfield* v. *Fane*, 507 U.S. 761, 765 (1993)), this Court has made clear that not all speech related to commerce is commercial speech. See e.g. *Bd. of Trustees of State Univ. of New York* v. *Fox,* 492 U.S. 469, 482 (1989) (addressing regulations, which "would prohibit tutoring, legal advice, and medical consultation provided (for a fee) in students' dormitory rooms" and holding that "[w]hile these examples consist of speech for a profit, they do not consist of speech that proposes a commercial transaction, which is what defines commercial speech").

Each of the Petitioning liquor stores uses the Douglas name to identify itself to customers. The name Douglas conveys a positive message to potential consumers (C.A. App. 124) in a similar way in which the name McDonalds on the side of a restaurant conveys considerable information about what a customer can expect to find inside. Since more is conveyed by these trade names than merely proposing a commercial transaction, they can be considered pure speech, rather than commercial speech. If the Petitioners' similar trade name are not commercial speech, the *Central Hudson* analysis performed by the First Circuit was misplaced.

3. The Decision of the First Circuit conflicts with decision by the Second, Fifth and Sixth Circuits. The Fifth Circuit correctly held that trade names that bear the risk of being misleading are still subject to the protections of the First Amendment if language can be included that eliminates the misleading nature of the trade name. *Piazza Seafood World, LLC* v. *Odom*, 448 F.3d 744 (5th Cir. 2006). In *Piazza*, the Fifth Circuit was confronted with seafood that was being marketed under trade names that suggested the fish included in the product was a local Louisiana product when in fact the fish was imported from Asia. *Piazza*, 448 F.3d at 752-53 (use of the trade names "Cajun Boy" and "Cajun Delight" for seafood imported from Asia was misleading).

Just as the use of the word Cajun could be rendered non-deceptive and therefore protected by the First Amendment by the inclusion of words like "product of China", the sole "misleading" characteristic of the Douglas name can, and historically has been, addressed by the inclusion of the disclaimer "all stores independently owned and operated." (Trial Exhibit 17).[6]

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[6] The Douglas name could not be found to be "actually misleading" based on the record below. No evidence was presented at trial that anyone had ever been deceived by the name. *Peel* v. *Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 106

With the inclusion of such clarifying language, the trade name would be neither actually nor potentially misleading.[7]

Under the analysis applied by the Fifth Circuit, the First Amendment would protect the use of the Douglas trade name, when accompanied by the disclaimer "all stores independently owned and operated." Once this conclusion is reached, the burden is on the State to justify its prohibition on the use of the Douglas name. When the City of Ann Arbor tried to restrict the use of the trade name "Sambo's" on the grounds that it impeded the City's efforts to improve racial harmony, the Sixth Circuit found

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(1990) (plurality) ("Given the complete absence of any evidence of deception in the present case, we must reject the contention that petitioner's letterhead is actually misleading"). As Justice Marshall noted, a statement is "actually" misleading when the record contains evidence that recipients of commercial speech "actually ha[ve] been misled by the statement." *Peel*, 496 U.S. at 112 (Marshall, J., concurring). See also, *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 145 (1994) ("Given 'the complete absence of any evidence of deception,' the Board's 'concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment'").

[7] The Fifth Circuit's analysis follows the teachings of this Court in similar cases. "The policy of the law to protect [trade names] as assets of a business indicates that their destruction should not be ordered if less drastic means will accomplish the same result." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612 (1946). This Court has also recognized that one such less dramatic means would be to require the use of qualifying language. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933) ("The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names"). The Fifth Circuit's holding in *Piazza* better reflects this Court's decisions in *Jacob Siegel Co.* and *Royal Milling Co.* then the First Circuit's holding that "the law imposes no requirement that a regulation of commercial speech constitute the least restrictive means of accomplishing the State's legitimate goal" (App. 14).

that the City failed to meet its burden of supporting its contention:

> Significantly, however, the City has produced no evidence to demonstrate that the actual operation of the restaurant under the name 'Sambo's' has retarded or impeded achievement or furtherance of its goal or racial equality. Tangible evidence of the disruption of racial harmony in Ann Arbor because of the presence of a restaurant named 'Sambo's' is not present in this record. The impact on these laudable goals by 'Sambo's' is speculative at best. Much more than a speculative casual relationship is required for even though exposure to the 'Sambo's' signs may offend some citizens, the ability of the City 'to shut off discourse solely to protect others from hearing it is dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'")

Sambo's Restaurants, Inc. v. *City of Ann Arbor*, 663 F.2d 686, 695 (6th Cir. 1981) quoting *Cohen* v. *California*, 403 U.S. 15, 21 (1971). The First Circuit did not require Rhode Island to make such a showing of harm. (App. 12) (declining to apply *Ibanez* v. *Florida Dept. of Business and Professional Regulation*, 512 U.S. 136, 146 (1994) ("'mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree'")). Neither Rhode Island nor the Intervenor put forward any evidence of harm caused by the use of the Douglas name or by joint advertising. No competitors were called to testify. No evidence was presented of any negative impact on the Rhode Island liquor market. The State brought forth no evidence of harm to consumers resulting from the use of the name Douglas and refused to identify any harm resulting from its use. (C.A. App. 186-87).

Likewise, in *Bad Frog Brewery, Inc.* v. *New York State Liquor Authority*, 134 F.3d 87 (2nd Cir. 1998), the Second Circuit concluded that a beer label depicting "a frog with the second of its four unwebbed 'fingers' extended in a manner evocative of a well known human gesture of insult" was protected as commercial speech. *Bad Frog*, 134 F.3d at 90, 96-97. Having found the trade mark protected by the First Amendment, the Second Circuit held that a state cannot rely on its own unsubstantiated contentions that a harm exists. In rejecting the unsupported contention "that the [bad] frog [label] appeals to youngsters and promotes underage drinking" the Second Circuit held "[t]he truth of these propositions [was] not so self-evident as to relieve the state of the burden of marshaling some empirical evidence to support its assumptions." *Bad Frog*, 134 F.3d at 100.

The First Circuit did not require Rhode Island to present "empirical evidence to support its assumptions." In fact, the Director of the Licensing Division of the Rhode Island Department of Business Regulation testified that no Rhode Island liquor stores have been driven out of business during the seven years the Douglas franchisees have operated in that State. (C.A. App. 172). When weighed against the restriction of speech, the connection between the State's interest and the means chosen to achieve it are especially tenuous. What is the evil Rhode Island seeks to cure by its restrictions on trade names and joint advertisements? The risk that consumers may think a store is a member of a chain or franchise bears no apparent relationship to any ends other than protecting the profitability of competitors.

C. Restrictions on Speech – Joint advertising

Just as the ban on chains and franchising is not confined to the field of alcoholic beverages, the application of the First Circuit's holding sustaining the joint advertising ban is not confined to advertisements

related to alcoholic beverages. The Court of Appeals' decision stands for the proposition that the First Amendment does not protect the placement of advertisements by multiple business entities. (App. 7-9).

The Court of Appeals concluded that the "act" of placing joint advertisements is conduct and not speech, and therefore not protected by the First Amendment. (App. 8). The provision at issue broadly bans any "[p]articipation in a coordinated or common advertisement." *See* §3-5-11(b)(1)(iii) (App. 86). This language, applied to other industries, could prohibit common advertisements from automobile dealerships, restaurant chains, or trade associations. Mere participation in an advertisement is enough to violate the ban and subject the advertiser to sanctions.

Rhode Island's provisions go beyond the statute found unconstitutional by this Court in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992) (finding that a statute, which punished the *act* of burning a cross, violated the First Amendment because speech was underlying in the *act* of cross burning). Rhode Island does not punish conduct that has an expressive component, it punishes speech as if speech itself were an unlawful activity. "To put it another way, common advertising and the use of a common name not only concerns unlawful activity, it is part and parcel of the unlawful activity." (District Court decision at App. 38). What is prohibited by §3-5-11(b)(1)(iii) is not agreements about products and prices, which is separately prohibited by §3-5-11(b)(1)(i) and (v). (App. 86). What §3-5-11(b)(1)(iii) prohibits is the advertisements themselves.

The municipal ordinance reviewed by this Court in *Secretary of State of Maryland* v. *Joseph H. Munson Co., Inc.*, concerned the financial aspect of charitable solicitation, requiring at least 75% of receipts to be used for charitable purposes. 467 U.S. 947, 959 (1984). Despite the ordinance being primarily concerned with business

"conduct," this Court found the use of restrictions on speech, when used as a tool to advance controls on conduct, to violate the First Amendment. 467 U.S. at 959 ("charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment").

Regardless of whether the ban on joint advertisements is viewed as a direct restriction on speech or as a restriction on conduct that is intertwined with speech, the First Circuit's holding that states may restrict joint speech without implicating First Amendment protections allows too much leeway for states to regulate speech in the guise of regulating the "act" of placing advertisements.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 06-2224

WINE & SPIRITS RETAILERS, INC.; JOHN HARONIAN; DOUGLAS WINE & SPIRITS - CRANSTON, INC.; DOUGLAS WINE & SPIRITS - CUMBERLAND, INC.; DOUGLAS WINE & SPIRITS - N. PROVIDENCE, INC.,
Plaintiffs - Appellants,

v.

JEFFREY GREER, in his capacity as Associate Director of the Department of Business Regulation; STATE OF RHODE ISLAND; UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND,
Defendants - Appellees.

Before

Boudin, Chief Judge,
Torruella, Circuit Judge,
Selya, Senior Circuit Judge,
Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: April 19, 2007

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been

denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en bane be denied.

By the Court:
/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 06-2224

WINE AND SPIRITS RETAILERS, INC., ET AL.,
Plaintiffs, Appellants,

v.

WINE AND SPIRITS RETAILERS, INC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, U.S. District Judge]

Before

Lynch, Circuit Judge,
Selya, Senior Circuit Judge,
and Howard, Circuit Judge.

Evan T. Lawson, with whom Robert J. Roughsedge, Michael Williams, and Lawson & Weitzen, LLP were on brief, for appellants.

Rebecca Tedford Partington, Deputy Chief, Civil Division, Department of Attorney General, with whom Patrick C. Lynch, Attorney General, was on brief, for state appellees.

Joseph S. Larisa, Jr. and Larisa Law and Consulting, LLC on brief for intervenor-appellee.

March 20, 2007

SELYA, Senior Circuit Judge. This appeal requires us to revisit the scene of an earlier battle. In Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005), we affirmed the district court's denial of preliminary injunctive relief against the enforcement of two amendments to Rhode Island's statutory scheme governing in-state liquor sales at retail. See R.I. Gen. Laws §§ 3-5-11, 3-5-11.1. Following further proceedings on remand, including a full-dress bench trial, the district court, ruling ore sponte, decided the case in favor of the defendants. The plaintiffs again appeal. Discerning no error, we affirm the judgment below.

I. BACKGROUND

Typically, we review factual determinations made during a bench trial for clear error and afford plenary review to the trier's formulation and application of the law. See Smith v. F. W. Morse & Co., 76 F.3d 413, 420 (1st Cir. 1996); see also Fed. R. Civ. P. 52(a). The existence of our earlier decision does not alter this basic standard of review. In considering a prior appeal from the grant or denial of preliminary injunctive relief, our merits-oriented conclusions "are to be understood as statements as to probable outcomes." Cohen v. Brown Univ., 101 F.3d 155, 169 (1st Cir. 1996).

This does not mean that, in such a situation, we must necessarily reinvent each and every wheel. To the extent that the record compiled at the preliminary injunction stage was "sufficiently developed and the facts necessary to shape the proper legal matrix were sufficiently clear, and [if] nothing in the record subsequently developed at trial constitutes substantially different evidence that might undermine the validity of the prior panel's rulings of law," those rulings may be deemed the law of the case.

Id. (citation and internal quotation marks omitted). It is against this backdrop that we turn to the record below.

For efficiency's sake, we assume the reader's familiarity with our earlier opinion. That said, we briefly recount the identity of the parties. Plaintiff-appellant Wine & Spirits Retailers, Inc. (W&S) is a Rhode Island corporation engaged in the interstate business of franchising package stores. Plaintiff-appellant John Haronian, a Rhode Island resident, is W&S's principal. Following our earlier decision, these two plaintiffs amended their complaint and enlisted three new plaintiffs, all Rhode Island-based package stores (the Retail Stores) that had entered into franchise agreements with W&S. The Retail Stores are all appellants here. Each of them possesses a Class A license to sell liquor at retail. Furthermore, each of them has operated, and desires to operate in the future, under the trade name "Douglas Wine & Spirits."

The principal defendants (appellees before us) are the State of Rhode Island and Jeffrey J. Greer, in his official capacity as the associate director of the Rhode Island Department of Business Regulation. We henceforth shall refer to these defendants, collectively, as "the State." In addition, a trade association, the United Independent Liquor Retailers of Rhode Island, has intervened as a defendant.

In our previous decision, we described in detail the relevant aspects of the statutory amendments challenged by the plaintiffs. See Wine & Spirits, 418 F.3d at 42-43. Briefly stated, those amendments, enacted in 2004, prohibit franchisees from holding Class A liquor licenses and nullify existing franchise agreements that conflict with that proscription. See R.I. Gen. Laws § 3-5-11.1. Rhode Island had barred chain-store organizations from holding Class A liquor licenses since 1933, and the Rhode Island General Assembly accomplished the broader prohibition, in part, by expanding the chain-store

definition to encompass franchise-type arrangements. See id. § 3-5-11(b).

There is another facet to this case (not mentioned in the earlier appeal). That facet involves the plaintiffs' challenge to a related statutory provision, not part of the 2004 amendment cycle, that imposes an in-state residency requirement for prospective liquor licensees. See id. § 3-5-10.

In the court below, the plaintiffs attacked the statutory scheme on several fronts. As stated, the district court nonetheless denied preliminary injunctive relief. See Wine & Spirits, 418 F.3d at 42. Later, the court conducted a bench trial and – for reasons described later in this opinion – repulsed each and all of the plaintiffs' initiatives.

This timely appeal followed. For ease in analysis, we divide the plaintiffs' assignments of error into three groups.

II. THE FIRST AMENDMENT CLAIMS

The First Amendment applies to the several states by operation of the Fourteenth Amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n.1 (1996). Here, the plaintiffs press two First Amendment claims, each of which charges abridgment of speech. No arguments pertaining to freedom of association have been briefed, and any such arguments are, therefore, waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

In essence, the plaintiffs assert that (i) the prohibition against participation in joint advertisements, R.I. Gen. Laws § 3-5-11(b)(1)(iii),[1] and (ii) the prohibition against

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[1] The plaintiffs to some extent also challenge the restrictions on coordinated marketing, see R.I. Gen. Laws § 3-5-11(b)(1)(iv), and the restrictions on agreed pricing, see id. § 3-5-11(b)(1)(v). Because these provisions are similar in character to the joint advertising ban and

the use of a trade name associated with a chain-store organization, see id. § 3-5-11(b)(1)(vi), violate the First Amendment. In our earlier decision, we acknowledged that "commercial speech, including truthful liquor advertising, is entitled to a measure of protection under the First Amendment." Wine & Spirits, 418 F.3d at 48. As to W&S and Haronian, however, we determined that the "provision of advertising and [trade name] licensing services is not speech that proposes a commercial transaction and therefore does not constitute commercial speech." Id. at 49 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989)). By the same token, the provision of such services is not protected as symbolic speech. Id. (citing United States v. O'Brien, 391 U.S. 367, 376-77 (1968)). Since the plaintiffs have advanced no new arguments on this front, there is no reason to revisit those conclusions.

That does not end this aspect of the matter because, in our earlier decision, we left open the question of whether the restrictions on joint advertising and shared trade names might infringe the First Amendment rights of a franchisee holding a Class A liquor license – a claim that neither W&S nor Haronian had standing to pursue. See id. at 48-50. Given the emergence of the Retail Stores as parties plaintiff – they appear to have been joined for precisely this purpose – we must now examine the merits of these contentions.

A. Joint Advertising.

With respect to joint advertising, the Retail Stores contend that section 3-5-11(b)(1)(iii) does not prohibit agreements about prices and products but, rather, prohibits the advertisements themselves. Building on this foundation, they suggest that, at its core, the prohibition "bans speech as a means of addressing underlying

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because the plaintiffs lavish most of their attention on the latter, we use section 3-5-11(b)(1)(iii) as an exemplar.

conduct." Appellants' Br. at 44. To support this extravagant claim, the Retail Stores point to evidence adduced at trial regarding joint advertisements that make no reference to agreed-upon prices or common products.

This argument lacks force. Section 3-5-11(b)(1)(iii) forbids a licensee's "[p]articipation in a coordinated or common advertisement." This prohibition does not target speech; each individual liquor licensee remains at liberty to disseminate information about its prices and products to other retail stores and to the public at large. See Wine & Spirits, 418 F.3d at 47 (making a similar point with respect to W&S's provision of business advice). Seen in that light, the statute is at a far remove from the legislation at issue in 44 Liquormart, which completely banned the advertising of prices. See 517 U.S. at 516. The statute at issue here merely proscribes conduct – the launching of advertisements resulting from pre-agreed commercial strategies. Such a ban is not a ban on commercial speech. See Wine & Spirits, 418 F.3d at 49. The fact that it is possible to design advertisements violative of the ban that do not mention specific prices or products does not prove that the statute is concerned with speech as opposed to conduct.

We add, moreover, that even if the joint advertising prohibition could be said to touch upon commercial speech under other circumstances, it would not implicate any protected interest possessed by the Retail Stores. Acting in concert to implement an advertising plan no more proposes a commercial transaction than does the provision of advertising services by W&S – a practice that we have found not protected under the First Amendment. See id. And, finally, the conduct in question is not so inherently expressive as to warrant First Amendment protection under the O'Brien doctrine. See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 126 S. Ct. 1297, 1310 (2006) (FAIR); see also O'Brien, 391 U.S. at 376-77.

In these circumstances, any restriction of speech would be purely incidental to the regulation of conduct. And as the Supreme Court recently reminded us:

> [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

FAIR, 126 S. Ct. at 1308 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

Taking a somewhat different tack, the plaintiffs suggest that the Rhode Island statute is flawed because other commercial entities are not forbidden from advertising jointly. That suggestion attempts to invoke the precept that, even in the commercial milieu, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 193-94 (1999). The precept, though sound, is inapposite here.

The Supreme Court has emphasized the importance of context in evaluating claims that legislation abridges First Amendment rights. See Edenfield v. Fane, 507 U.S. 761, 774 (1993); see also Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469 (1997). In line with that emphasis, the precept upon which the Retail Stores rely cannot be construed to divest the states of their ability to devise specific rules for businesses in different fields, that is, for businesses that are not similarly situated. See, e.g., Edenfield, 507 U.S. at 774 (stressing the importance, in evaluating the constitutionality of commercial speech regulations, of distinctions between different professions); cf. 37712, Inc. v. Ohio Dep't of Liquor Control, 113 F.3d 614, 620-23 (6th Cir. 1997) (rejecting due process and equal protection challenges because holders of different

licenses were not similarly situated). This is merely a reflection of the time-honored tenet that, within wide limits, courts must defer to state legislative classifications constructed to further legitimate economic objectives. See 37712, Inc., 113 F.3d at 622.

So it is here. A trial court's findings of fact, made in connection with one legal theory, may often be treated as fungible in connection with another. See, e.g., Societe Des Produits Nestle v. Casa Helvetia, Inc., 982 F.2d 633, 642 (1st Cir. 1992). That principle applies in this case; although the lower court addressed the "classification" argument in equal protection terms, its findings of fact are readily transferable to the precincts patrolled by the First Amendment.

The district court found as a matter of fact that the Retail Stores had failed to demonstrate that they and those other entities to which they alluded were similarly situated. This finding is not clearly erroneous (indeed, it appears to be unassailable). Consequently, we reject the plaintiffs' disparate treatment claim.

B. Shared Trade Names.

The remaining prong of the plaintiffs' First Amendment challenge involves the statutory restriction on the use of shared trade names. See R.I. Gen. Laws § 3-5-11(b)(1)(vi) (prohibiting Class A licensees from using "[a]ny term or name identified as a chain or common entity"). The Retail Stores assert a constitutional right to do business under the Douglas name, which they believe "conveys a positive message to potential consumers." Appellants' Br. at 42.

It cannot be gainsaid that the use of a trade name implicates the user's commercial speech rights. See Friedman v. Rogers, 440 U.S. 1, 11 (1979). This brings front and center the familiar four-part test for whether a regulation of commercial speech is constitutionally permissible. See, e.g., Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002) (citing Cent. Hudson Gas &

Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)); El Día, Inc. v. P.R. Dep't of Consumer Affairs, 413 F.3d 110, 113 & n.5 (1st Cir. 2005).

It is not always necessary, however, to deal with each of the test's four parts. In framing the inquiry, the threshold question is whether "the commercial speech concerns unlawful activity or is misleading." W. States Med. Ctr., 535 U.S. at 367. If so, the inquiry ends there: "the speech is not protected by the First Amendment." Id.; see Fla. Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995); Edenfield, 507 U.S. at 768. The Retail Stores are unable to cross this threshold.

In a case that antedated Central Hudson, the Supreme Court held that the First Amendment posed no obstacle to state regulation of trade names when "a significant possibility" existed that such names would "be used to mislead the public." Friedman, 440 U.S. at 13, 15. In that instance, the plaintiffs challenged a total ban on the use of trade names in the practice of optometry. While mulling the challenge, the Court took stock of the myriad possibilities for deception and concluded that the ban related to "conduct the State rationally may wish to discourage." Id. at 13. With that framework in place, the Court upheld the restriction, explaining that it had only an incidental effect on the commercial speech rights of optometrists (who remained free to advertise their prices, products, and services under their own names). Id. at 15-16.

Since its decision in Friedman, the Court has made a doctrinal refinement, distinguishing in the professional services context between commercial speech that is inherently or actually misleading and commercial speech that is only potentially misleading. See, e.g., Ibanez v. Fla. Dep't of Bus. & Prof'l Reg., Bd. of Accountancy, 512 U.S. 136, 144-46 (1994); In re R. M. J., 455 U.S. 191, 203 (1982); see also Am. Acad. of Pain Mgmt. v. Joseph, 353 F.3d 1099, 1106-07 (9th Cir. 2004). Under the doctrine as

refined, advertising that is actually misleading "may be prohibited entirely." In re R. M. J., 455 U.S. at 203. Contrastingly, a state "may not place an absolute prohibition on certain types of potentially misleading information... if the information also may be presented in a way that is not deceptive." Id. We need not (and do not) decide the issue, but we note that recent decisions have applied this dichotomy beyond the professional services context. See, e.g., Pearson v. Shalala, 164 F.3d 650, 655 (D.C. Cir. 1999).

In the case at hand, the plaintiffs argue that the State has not shown that the use of a shared trade name by independent package stores is misleading and that, in all events, there is no evidence of consumer confusion. While certain elements of this argument are irreproachable – a governmental entity attempting to enforce a restriction on commercial speech has the burden of justifying the restriction, W. States Med. Ctr., 535 U.S. at 373, and courts will not sustain restrictions resting either on a dearth of evidence of deception or on unsupported assertions, see Ibanez, 512 U.S. at 145, 148-49; El Día, 413 F.3d at 116 – the argument as a whole does not survive scrutiny.

Even assuming, for argument's sake, that the Ibanez dichotomy applies here, the State's concern about the misleading nature of chain-associated trade names, when used by independent package stores, is readily supportable. The district court, in its preliminary injunction ruling, refused to enjoin the enforcement of the "no franchise" provisions contained in the statutory scheme but temporarily blocked the enforcement of the prohibition against the use of a shared trade name. See Wine & Spirits, 418 F.3d at 44. In conformity with those rulings, the Retail Stores relinquished their franchise agreements and claimed, from that point forward, to be acting as independent businesses. They nonetheless continued to use the Douglas name. Although we

subsequently allowed the injunction against enforcement of the "trade name" restriction to lapse, see id., the Retail Stores apparently persisted in using a shared trade name.

At trial, the district court, as the finder of the facts, examined the Retail Stores' actual use of the shared trade name during the period when they professed to be operating independently. It determined that each of the former franchisees had simply appended the name of the municipality in which its shop was located to the Douglas name. The court received evidence that newspaper advertisements purportedly placed by individual stores on a rotating basis featured the Douglas name in large letters and bold font, while reporting the store's location information in much smaller print that was "far less likely to be noticed by the reader"; that participating stores prominently displayed exact replicas of these advertisements and offered for sale the same products (both advertised and non-advertised) for the same prices; and that the Retail Stores continued to receive suggested store layouts and employee dress codes from W&S. Citing this evidence, the court found as a fact that the Retail Stores' shared use of the Douglas name "conveys and, obviously, is intended to convey to consumers the impression that all of the stores are part of a single entity and operate in concert." Given the Retail Stores' assurances that they had been operating independently from and after the effective date of the 2004 amendments, the court concluded that the impression conveyed by the use of the shared trade name was "untrue and, therefore, misleading."

These findings are not clearly erroneous (indeed, the plaintiffs do not contest them). They graphically illustrate why the use of a shared trade name in the retail liquor market by supposedly independent package stores poses an area of legitimate concern for a state that has abolished franchise and chain-store arrangements in

that market. The findings, therefore, comprise a showing sufficient to underpin the restriction enacted by the Rhode Island General Assembly.

The Retail Stores counter that the State should, at most, be able to require the placement of qualifying language (say, "independently owned and operated") in connection with independent retailers' use of a shared trade name. That is whistling past the graveyard: as a general matter, the law imposes no requirement that a regulation of commercial speech constitute the least restrictive means of accomplishing the State's legitimate goal. See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001); Passions Video, Inc. v. Nixon, 458 F.3d 837, 843 (8th Cir. 2006). At any rate, the record here contains nothing that would compel – or even support – a conclusion that such a disclaimer would be an effective means of avoiding deception.

That ends this chapter of the tale. As the district court supportably found, the Retail Stores' actual usage of the shared trade name tends, in a misleading fashion, to identify the users as part of a chain or entity under common control. For that reason, the restriction imposed by the State is constitutionally permissible.[2]

III. THE COMMERCE CLAUSE CLAIMS

The Constitution grants to Congress the power "[t]o regulate Commerce... among the several States." U.S.

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[2] None of the three appellate decisions bruited by the Retail Stores casts doubt upon this conclusion. In two of them, the restricted speech was neither misleading nor related to unlawful activity. See Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 98 (2d Cir. 1998); Sambo's Rests., Inc. v. City of Ann Arbor, 663 F.2d 686, 694 (6th Cir. 1981). In the third, the Fifth Circuit, adjudicating an "as applied" challenge, found the use of the trade names at issue to be not misleading in view of the plaintiff's sophisticated consumer base and distinctive labeling method. See Piazza's Seafood World, LLC v. Odom, 448 F.3d 744, 753 (5th Cir. 2006). This decision has little bearing on the issues before us.

Const. art. I, § 8, cl. 3. Within this grant of power, what has come to be known as the dormant commerce clause prohibits "protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." Grant's Dairy—Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 18 (1st Cir. 2000). State regulation of the sale of alcoholic beverages is, however, unique; while such regulation is subject to the nondiscrimination principles of the dormant commerce clause, the Twenty-first Amendment confers upon the several states wide-ranging control over the structure of local liquor distribution systems. See Granholm v. Heald, 544 U.S. 460, 487-89 (2005).

Notwithstanding this constitutionally sanctioned zone of control, the plaintiffs charge that Rhode Island's liquor distribution regime violates the dormant commerce clause. This charge, which was not addressed in our earlier decision, has two facets – one narrowly focused and the other more global. In a rifle-shot attack, the plaintiffs allege that, by limiting Class A licenses to Rhode Island residents, R.I. Gen. Laws § 3-5-10 discriminates on its face against out-of-state residents. In a broader fusillade, they allege variously that the statutory scheme discriminates in both purpose and effect, legislates extraterritorially, and unduly burdens the free flow of interstate commerce.

A statute that discriminates on its face against interstate commerce, whether in purpose or effect, demands heightened scrutiny. See Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 35 (1st Cir. 2005). Under this rigorous form of review, a statute is invalid unless it furthers a legitimate local objective that cannot be served by reasonable non-discriminatory means. See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99-101 (1994). Relatedly, the Supreme Court has explained that legislation purporting to regulate commerce that occurs wholly beyond a state's borders "is invalid regardless of

whether the statute's extraterritorial reach was intended by the legislature." Healy v. Beer Inst., 491 U.S. 324, 336 (1989); see Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 79 (1st Cir. 2001), aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).

A statute that "regulates evenhandedly and has only incidental effects on interstate commerce engenders a lower level of scrutiny." Alliance of Auto. Mfrs., 430 F.3d at 35 (citation and internal quotation marks omitted). In those circumstances, courts employ the balancing test limned in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). That test is straightforward: assuming that the statute operates evenhandedly to achieve a legitimate local interest and that its effects on interstate commerce are incidental, it will stand "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." Id. at 142.

With these jurisprudential building blocks in place, we turn to the concerns identified by the plaintiffs.

A. Residency Requirements.

The plaintiffs' first line of attack is directed at section 3-5-10. A liquor-license residency requirement has been in force in Rhode Island since 1933 (albeit with modifications over time). With exceptions not relevant here, the current version of the Rhode Island law provides that Class A package store licenses are to be issued "only to... residents of this state." R.I. Gen. Laws § 3-5-10(a)(1). Relatedly, no such license "shall be issued to [a] corporation unless each officer, director or stockholder is a suitable person to hold a license." Id. § 3-5-10(b)(1).[3]

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[3] In a different provision, the statute states that "[r]etailer's licenses may, however, be issued to corporations incorporated in any other of the United States which are authorized by the secretary of state to transact business in this state." R.I. Gen. Laws § 3-5-10(a)(1). Despite this provision, the parties have stipulated that "all Class A licenses must be held by Rhode Island residents or Rhode Island corporations."

These requirements, the plaintiffs contend, violate the dormant commerce clause because they discriminate on their face against out-of-state residents. The district court did not reach the merits of this contention. Rather, the court ruled that the plaintiffs lacked standing to contest the residency requirements. It based this ruling on its findings (i) that the Retail Stores were Rhode Island entities, each of which already possessed a Class A license; (ii) that W&S, a Rhode Island corporation, had never expressed an interest in obtaining a license; and (iii) that Haronian, also a Rhode Islander, had displayed a similar indifference to acquiring a Class A license. Given these facts, the plaintiffs had failed to demonstrate any injury in fact stemming from section 3-5-10's residency requirements. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (describing the requirements for Article III standing); Pagán v. Calderón, 448 F.3d 16, 26-27 (1st Cir. 2006) (similar).

On appeal, the plaintiffs do not challenge the district court's findings of fact. They do, however, argue that as a legal matter the district court took too crabbed a view of standing. They urge us to apply the doctrine that, under the dormant commerce clause, "cognizable injury is not restricted to those members of the affected class against whom states... ultimately discriminate." Houlton Citizens' Coal. v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999) (citing Gen. Motors Corp. v. Tracy, 519 U.S. 278, 286 (1997)). The plaintiffs insist that this doctrine enables them to challenge a law that violates the dormant commerce clause even though the law's harmful effects on them are only indirect.

We have no quarrel with the abstract statements of law set forth in Houlton. But context is all-important,

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Given the plaintiffs' lack of standing, see text infra, we need not resolve the seeming contradiction between the quoted provision and the parties' stipulation.

and those statements are of no help to the plaintiffs in the circumstances of this case. Here, significantly, the plaintiffs have failed to show any cognizable harm, direct or indirect, attributable to the residency requirements of section 3-5-10. We explain briefly.

The injuries of which the plaintiffs complain arise in consequence of Rhode Island's ban on franchise and chain-store arrangements, not in consequence of the residency requirements per se. After all, the plaintiffs are all Rhode Island residents and, if favoritism exists, none of them could conceivably have suffered any cognizable harm as a result of it. This deficiency distinguishes the plaintiffs' case from cases like Houlton in which claimants have succeeded in making out the rudiments of standing. See, e.g., Gen. Motors, 519 U.S. at 286-87; Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267 (1984); Alliance of Auto. Mfrs., 430 F.3d at 37; Houlton Citizens' Coal., 175 F.3d at 183. Consequently, we uphold the district court's determination that the plaintiffs lack standing to challenge the residency requirements for Class A liquor licensees.

B. Overall Statutory Scheme.

Taking aim at R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1, the plaintiffs mount a ferocious attack on the State's prohibition against franchise and chain-store arrangements in the retail liquor industry. Their argument runs along the following lines. In determining whether an entity is a chain-store organization (and, thus, forbidden from obtaining a Class A liquor license), the statutory scheme continues to count "chains in which one or more stores are located outside of the state." See id. § 3-5-11(a). That aspect of the statute, when combined with the 2004 ban on franchise-type arrangements, creates (or so the plaintiffs tell us) a regime designed to achieve economic protectionism by advantaging independently owned Rhode Island liquor stores. So viewed, the plaintiffs continue, the statutory scheme

discriminates in both purpose and effect, legislates extra-territorially, and unduly burdens the free flow of interstate commerce.

The State takes a diametrically opposite position. It asserts that the statutory scheme applies uniformly across the board, barring chain-store organizations and franchise entities, regardless of whether they are based in Rhode Island, from owning package stores. It adds that the evidence adduced at trial revealed no burden on interstate commerce, let alone a discriminatory effect.

We begin with purpose. Parties challenging the validity of a state statute on "purpose" grounds must show that the statute was prompted by a discriminatory purpose. See Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Alliance of Auto. Mfrs., 430 F.3d at 37. Here, the plaintiffs maintain that their effort finds sustenance in two places in the record. First, they identify what they term an admission by the State that the 2004 amendments were not enacted to promote temperance. Second, they point to two actions by lawyers representing the defendants (actions which, in the plaintiffs' view, make pellucid that the legislature's sole purpose was to keep the retail liquor industry from being dominated by a few mega-players wielding nationwide market power). Based on these isolated snippets, the plaintiffs urge us to hold that the real goal of the statutory scheme is economic protectionism.

The district court declined to make that quantum leap, and so do we. The words of a legislative body itself, written or spoken contemporaneously with the passage of a statute, are usually the most authoritative guide to legislative purpose. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463 n.7, 471 n.15 (1981); Houlton Citizens' Coal., 175 F.3d at 191. The purpose of the 2004 amendments, as articulated in the statute itself, is to "promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage

industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11.1(a). To put this statement of purpose into perspective, it should be recalled that the prohibitions against franchise and chain-store arrangements in the retail liquor industry are part of Title 3 of the Rhode Island General Laws. Title 3's stated purpose is the "promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." Id. § 3-1-5. The plaintiffs have not proffered any convincing reason for doubting these formal statements of legislative purpose.

To be sure, the plaintiffs try. The centerpiece of their effort is the State's so-called admission that the 2004 amendments were not intended to promote temperance. That brazen claim relies on the State's answer to an interrogatory, which clarified that the State was not planning to argue in the district court that the amendments had actually reduced the consumption of alcoholic beverages. We are hard-pressed to see how that interrogatory answer, which merely narrowed the field as to the issues that the State was planning to emphasize at trial, in any way vitiates the General Assembly's clear statements of overall legislative purpose.

The remainder of the plaintiffs' evidentiary cache consists of two statements of counsel. The first is a comment by counsel for the intervenor-defendant – a trade association, not a state agency – about the need to count out-of-state entities in the chain-store calculus lest a "giant, behemoth, nationwide liquor retailer... quickly dominate the entire market with [its] nationwide market power, thereby completely undermining in one fell swoop the purpose of the law, which is to treat all Class A license holders equally." The second is an offer of proof tendered by an attorney for the State in connection with a rebuffed exhibit, which was designed to supply background for the General Assembly's decision to structure the retail liquor industry without any chain-

store "entity controlling the business in a number of different locations." To say that these statements override – or even weaken – the legislature's formal statements of purpose would be to elevate hope over reason.

What we have said to this point fully answers the plaintiffs' questions about the General Assembly's intent. On this record, we have no choice but to reject the construct that enactment of the overall statutory scheme was driven by a discriminatory purpose. See generally Fireside Nissan, Inc. v. Fanning, 30 F.3d 206, 218 (1st Cir. 1994) (finding protection of consumers against perceived "harmful franchising practices" to be a legitimate legislative objective).

The plaintiffs' claim of discriminatory effect is equally unavailing. Here, too, the plaintiffs must carry the devoir of persuasion. See Alliance of Auto. Mfrs., 430 F.3d at 40. After a full trial, the district court found no compelling evidence of discriminatory effect. Because that finding is not clearly erroneous, it commands our respect. See Fed. R. Civ. P. 52(a).

The plaintiffs' principal rejoinder rests on an overly expansive reading of our decision in Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005). In that case, the challenged statute exempted existing pharmacies (roughly 92% of which were locally owned) from compliance with a set of facially neutral statutory requirements. Id. at 55-56. The statute also allowed those "grandfathered" pharmacies to wield great influence in the enforcement of the statutory requirements vis-à-vis new entrants. Id. Statistical data adduced at trial "strongly indicate[d]" that the statute suppressed competition and favored local interests. Id. at 56.

The instant case is easily distinguishable from Walgreen. Here, the plaintiffs adduced no evidence that the prohibition on franchise and chain-store arrangements, in itself, has had, or threatens to have, a debilitating or unfair impact either on competition in

general or – leaving aside residency requirements – on out-of-state enterprises in particular. There is, for example, no evidence of any carve-out or other device that would enable in-state entities to evade the challenged restrictions, nor is there any hint of a home-field advantage in connection with the State's enforcement of the restrictions. The absence of any such evidence is telling. See, e.g., Exxon Corp. v. Gov. of Md., 437 U.S. 117, 125-26 (1978) (rejecting unsubstantiated argument that effect of evenhanded proscription against refiners was "to protect in-state independent dealers from out-of-state competition"); see also Lewis v. BT Inv. Mgrs., Inc., 447 U.S. 27, 42 (1980) (discussing Exxon and terming the absence of discrimination between interstate and local competitors "a most critical factor").

Notwithstanding this lack of evidence, the plaintiffs asseverate that evenhanded laws that apply to in-state and out-of-state entities alike nonetheless may produce a discriminatory effect, in violation of the dormant commerce clause, if they "favor a subset of in-state interests." Walgreen, 405 F.3d at 58 (citing C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994)). This asseveration can be dispatched quickly. Leaving to one side the residency requirements, see supra Part III(A), the statutory scheme at issue here does not favor in-state interests at all.[4]

To this, we add one further observation: that a state regulation that burdens some interstate firms "does not,

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[4] The plaintiffs also make a rather feeble argument that the statutory scheme discriminates by exempting certain types of in-state establishments, such as wineries and brewpubs purveying locally produced wine and beer, from the franchise and chain-store prohibitions. See R.I. Gen. Laws §§ 3-5-11(a), 3-5-11.1(a). But there has been no showing here either that these kinds of business establishments are similarly situated to package stores or that their claimed exempt status has "deprive[d] out-of-state businesses of access to a local market." C & A Carbone, 511 U.S. at 389. Consequently, we reject the argument out of hand.

by itself, establish a claim of discrimination against interstate commerce." Exxon, 437 U.S. at 126 (footnote omitted). Thus, the fact that the mosaic of state laws enacted by the General Assembly may have had a negative impact on W&S's business model is, in itself, insufficient to show discriminatory effect. .

This brings us to the claim that the statutory scheme has an impermissible extraterritorial reach. The district court did not address this claim, presumably due to shortcomings in the manner of its presentment. Even assuming that this argument was squarely presented, it does not profit the plaintiffs' cause.

A statute is per se invalid if it "regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state." Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 311 (1st Cir. 2005) (quoting Pharm. Research & Mfrs. of Am., 249 F.3d at 79). The argument sketched by the plaintiffs on this point is that the statutory scheme dictates that businesses must abandon (or refrain from entering into) out-of-state franchise and chain-store arrangements in order to be eligible for a Rhode Island retail liquor license. That bare claim, without more, fails to pass muster. The plaintiffs have not explained how the commercial activity identified is "wholly outside" the State's boundaries nor have they explained why the force exerted by the statutory scheme, with respect to out-of-state conduct, can fairly be described as "control." This sophisticated area of law requires developed argumentation, with evidentiary support. Cf. Beer Inst., 491 U.S. at 337 n.14 (labeling as a "critical consideration" regarding extraterritorial reach claims the "overall effect of the statute on both local and interstate commerce"). On the sketchy arguments asserted by the plaintiffs, we are unable to say that the scheme "necessarily requires out-of-state commerce to be conducted according to in-state terms." Pharm. Care Mgmt. Ass'n, 429 F.3d at 311

(quoting Cotto Waxo Co. v. Williams, 46 F.3d 790, 794 (8th Cir. 1995)).

Leaving residency strictures to one side, see supra Part III(A), the most that the plaintiffs have shown is that the neutral, evenhanded requirements that we have been discussing incidentally burden interstate commerce by precluding various methods of distribution in the retail liquor market. That is not enough. In order to invalidate the requirements, any such burden would have to be "clearly excessive in relation to the putative local benefits." Pike, 397 U.S. at 142.

Here, the hoped-for local benefits consist primarily of regulating and safeguarding against anticompetitive behavior in the retail liquor market. See R.I. Gen. Laws § 3-5-11.1; see also Heald, 544 U.S. at 488-89; Wine & Spirits, 418 F.3d at 51, 54. The corresponding burdens on interstate commerce are minimal. Again leaving to one side the residency requirements, see supra Part III(A), the plaintiffs have identified only two conceivable burdens: a loss of flexibility in arranging business affairs and a less-than-optimally-efficient distribution system for alcoholic beverages that have traveled through interstate commerce. Even accepting that these are real burdens, the plaintiffs have the obligation of proving excessiveness, see Pharm. Care Mgmt. Ass'n, 429 F.3d at 313 – and they have not come close to showing that the burdens they envision are excessive in relation to the statutory scheme's legitimate goals.

We need not tarry. The Supreme Court previously has rejected the notion that the dormant commerce clause protects particular business structures or methods of operation in retail markets. See Exxon, 437 U.S. at 127. The plaintiffs' argument that consumers would be advantaged by unregulated competition in retail liquor sales, like the argument rejected in Exxon, "relates to the wisdom of the statute, not to its burden on commerce." Id. at 128. It is, therefore, of little moment. The bottom line

is that the plaintiffs have failed to prove a violation of the dormant commerce clause.

IV. THE EQUAL PROTECTION CLAIM

In a last-gasp effort to stem an unfavorable tide, the plaintiffs advance an equal protection challenge to the statutory scheme. This challenge presents something of a moving target; its specifics have been in constant flux during the course of the litigation. At this juncture, the challenge has morphed into an assault on the legitimacy of the State's interest in enacting the statutory scheme.

We apply rational basis scrutiny to equal protection challenges to economic legislation. See Wine & Spirits, 418 F.3d at 53 (citing Hodel v. Indiana, 452 U.S. 314, 331 (1981)). Using that level of scrutiny, economic legislation will be upheld as against an equal protection challenge if "the means chosen by the legislature are rationally related to some legitimate government purpose." Id. Refined to bare essence, the plaintiffs' current challenge is yet another iteration of their by-now-discredited claim that the Rhode Island General Assembly's principal concern in enacting the amendments was economic protectionism. As we previously have made clear, the plaintiffs' underlying premise – that economic protectionism is the primary justification for Rhode Island's statutory scheme – is incorrect. See supra Part III(B). Contrary to the plaintiffs' rodomontade, the State has not "freely admit[ted]" that motivation, nor have the plaintiffs identified any evidence that fairly supports it. Accordingly, we reject the plaintiffs' ipse dixit and affirm our preliminary conclusion that no cognizable equal protection violation has been demonstrated. See Wine & Spirits, 418 F.3d at 53-54.

V. CONCLUSION

We need go no further. State legislatures acting in the public interest are entitled to considerable deference in mapping the contours of economic legislation. While that deference must take full account of constitutional

constraints, the Rhode Island General Assembly has not crossed any constitutional boundaries here. Accordingly, we uphold the judgment below.

Affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

**********		CIVIL ACTION
WINE & SPIRITS RETAILERS, INC., ET AL	*	04-418T
	*	
VS.	*	JULY 19, 2006
	*	
JEFFREY GREER, ET AL	*	PROVIDENCE, RI
**********		

HEARD BEFORE THE HONORABLE ERNEST C. TORRES CHIEF JUDGE
(DECISION)

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Proceeding reported and produced by computer-aided stenography

THE COURT: Good afternoon.

MR. ROUGHSEDGE: Good afternoon, your Honor.

Your Honor, Mr. Lawson sends his regards. He had a previously scheduled appointment the client asked him to attend. He means no disrespect to the Court. He wanted to be here. In fact, he's probably been trying to call me incessantly.

THE COURT: He sends his regards?

MR. ROUGHSEDGE : Yes.

THE CLERK: The matter before the Court is Civil Action 04-418T, Wine & Spirits, et al versus State of Rhode Island.

THE COURT: This case is here for the issuance of a bench decision on the claims brought by the plaintiffs.

The plaintiffs have brought a seven-count Complaint that the Rhode Island statute prohibiting chain store organizations and franchise operations from engaging in retail sale of alcoholic beverages violates nearly every provision of the Constitution except the guarantee of the right to bear arms and the prohibition against cruel and unusual punishment. That's, obviously, a slight overstatement, but maybe not too much.

The Complaint consists of, basically, a litany of the constitutional provisions allegedly violated followed by a simple assertion that the statute violates them.

As a general matter, it alleges that the Rhode Island statute violates the plaintiff's First Amendment rights of free speech and freedom of association, the Commerce Clause, the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the 14th Amendment.

Now, it's difficult to determine the precise nature of some of the claims, because in some cases neither the claim itself nor the basis for the claim is very clearly articulated either in the Complaint, the memoranda of counsel or the arguments that have been advanced by counsel.

Most of the claims appear to be based on what seems to be the, seems to the Court to be the plaintiff's overly expansive interpretation of the reach of various constitutional provisions, and the plaintiff's view that any restrictions on what they consider to be advantageous business practices are unconstitutional.

This case originally was brought by Wine & Spirits, the putative franchisor, and at the preliminary injunction stage, on which the Court also heard evidence, it focused on the claims that, first of all, Section 3-5-11(b)(l) violated Wine & Spirits' right to freedom of speech because it prevented Wine & Spirits from providing advice to franchisees.

Second claim was that 3-5-11.1(a) violated Wine & Spirits' right to associate with franchisees for economic purposes, because it prohibits the issuance of Class A licenses to either franchisors or franchisees.

And the third claim upon which the plaintiff focused at the preliminary injunction stage was the claim that the prohibition against franchise sales violates Wine & Spirits' right to equal protection, because it applies only

to Class A licensees and not to Class BV licensees, operators of restaurants and similar establishments.

For reasons stated in this Court's memorandum and order dated April 8, 2005, this Court found little likelihood that Wine & Spirits would succeed on any of those claims and, therefore, denied Wine & Spirits' request for a preliminary injunction.

Wine & Spirits appealed and the Court of Appeals affirmed. The Court of Appeals agreed with this Court's finding that nothing in the statute prevents Wine & Spirits from providing advice to Class A licensees. The Court of Appeals did not reach the question of whether the prohibitions against common advertising or the use of a common name constituted impermissible restraints on commercial speech, because, first of all, it determined that Wine & Spirits' activities were not commercial speech; and second, that the Class A licensees were not a party to the suit, that any commercial speech involved was commercial speech that was possessed by the putative franchisees, and they weren't parties.

The Court of Appeals also agreed that the First Amendment Right of Association does not confer on business entities any right to coordinate market activities for the purpose of increasing their market share simply because speech is a component of those activities.

Finally, the Court of Appeals agreed with this Court's finding that because the statute is economic legislation that neither employs suspect classifications nor infringes upon fundamental rights, it should be judged under a rational basis test, and that Wine & Spirits failed to demonstrate that the statute lacks a rational basis or that the distinction between Class A licensees and Class BV licensees is arbitrary.

That's pretty much the travel of the case up to this point, and little has changed since the preliminary injunction was denied except that, first of all, Wine & Spirits filed an Amended Complaint adding as plaintiffs

three Class A licensees that are affiliated with Wine & Spirits.

The second change was that the plaintiffs have now expanded their focus to include all of the other complaints asserted in the Complaint. They've now gone beyond the First Amendment free speech and freedom of association claims.

And the third thing, the only other change is the plaintiffs have attempted to present a picture of the relationship between Wine & Spirits and its franchisees or the individual retail stores that is much different than the picture that was presented at the preliminary injunction hearing

Based upon the evidence presented both at the preliminary injunction hearing and the trial on the merits, I find the relevant facts in this case to be as follows: Since 1933, Rhode Island has statutorily prohibited the retail sale of alcoholic beverages by what the statute refers to as chain store organizations.

Further, I find that Wine & Spirits and all of the individual stores that are, are or were franchisees are Rhode Island entities; they're all either Rhode Island corporations or Rhode Island residents.

Further, before the amendments to the statute took place and the preliminary injunction was denied, Wine & Spirits and its participating liquor stores were parties to a Franchise Agreement that contained the following provisions and had the following characteristics: Each franchisee was given an exclusive franchise within a specified geographic area. The franchisees each had different corporate names that were significantly different in most cases. For example, one corporation was NAB Liquors, another was CWS and so forth, but all of them did business under the trade name Douglas Wine & Spirits.

The franchisees were required to carry certain products and prohibited from carrying other products by the Franchise Agreement, and Wine & Spirits specified the vendors from which the franchisees could purchase products and the layout of the franchisees' stores.

Franchisees were required to pay an annual franchise fee and to contribute to an advertising and promotion fund that was controlled by Wine & Spirits. Wine & Spirits could terminate the Franchise Agreements at any time due to a failure of the franchisee to comply with the terms of the Franchise Agreement.

Franchisees displayed posters and other literature at their individual stores containing references to the Douglas website. On behalf of all of its franchisees, Douglas negotiated with liquor wholesalers for volume discounts, and every two weeks Douglas placed ads in the Providence Journal on behalf of -- Douglas Wine & Spirits, I guess it was, placed ads in the Providence Journal on behalf of all participating stores, and those ads listed the products for sale at all Douglas stores and the prices charged fort those products.

Now, more recently, the Franchise Agreements have been replaced by what are labeled Consulting Agreements, which purport to characterize Wine & Spirits' role as simply providing what is referred to as advice and suggestions, which the individual stores are free to reject and which the Consulting Agreements also characterize the stores as independent contractors.

But the evidence shows that despite the semantics, very little has changed. The individual stores still have exclusive territories assigned to them. The stores have all changed their corporate names to, and continue to do business under Douglas Wine & Spirits. The only distinction in the names being that they have added, each store has added a single word stating the town in which the store is located. So, for example, there is now a

Douglas Wine & Spirits Cranston, Douglas Wine & Spirits North Providence, and so forth.

Wine & Spirits still negotiates prices with wholesalers on behalf of all Wine & Spirits stores. Although, apparently, that's not as an extensive practice as it previously was. Wine & Spirits still issues bulletins telling stores what products to carry or not to carry and what prices to charge. And although such admonitions are now characterized as suggestions, some of them, like the prohibition in one of the circulars against carrying Smirnoff Twisted Grape flavored vodka appear to be much more than mere suggestions.

Moreover, the products at all participating stores continue to be priced by a computer keyed into the cash register system in each store, and the prices are entered centrally by Wine & Spirits although it is claimed that individual store managers can mark down the prices at the register in order to match prices charged by competitors.

Wine & Spirits still issues what are now called suggestions regarding store layouts and dress codes for store employees.

Ads are still placed in the Providence Journal every two weeks except that now the ads purportedly are alternately placed by individual stores rather than by Wine & Spirits.

However, each ad prominently displays the Douglas Wine & Spirits name in large, bold-face type followed by the location of the store that purportedly placed the ad, which appears in much smaller type, that is far less likely to be noticed by the reader.

In fact, there was testimony by one of the plaintiff's own witnesses that the ads are paid for by an entity called Tri-State, which is an affiliate of Douglas Wine & Spirits. All of the other participating stores display exact copies of each ad and offer the same products for the same prices

listed in the ad, and it appears that individual stores still pay a fee to Douglas Wine & Spirits for its advice and services and that Wine & Spirits retains its right to cancel the relationship.

Although there was one individual store manager who claimed that he determines the prices of the products sold in his store, the evidence shows that rarely, if ever, would any store fail to offer a product shown in the ad, in an ad, at the price specified in the ad.

The evidence also shows that, with one or two exceptions, the participating stores charge identical prices for the non-advertising products that were randomly surveyed by the Department of Business Regulation, by Ms. Main.

As a result of the volume involved and bargaining on behalf of all participating stores, Wine & Spirits sometimes is able to lower prices from wholesalers to levels that are lower than the prices obtained by independently-operated stores, which gives them a competitive advantage.

Wine & Spirits asserts that the savings have been passed on to consumers, but there's been no evidence to substantiate that assertion, we don't know any particulars about that.

Those are the facts as the Court finds them. I'll now proceed to each of the claims asserted by the plaintiffs, and I'll lump some of them together. First of all, I will take up the First Amendment claims, which allege violations of the right to speech and association. Those are the claims set forth in Counts I and II.

The plaintiffs claim that Section 3-5-11(b)(l) violates their First Amendment right to freedom of speech and association. Both this Court and the First Circuit have previously determined that Section 35-11(b)(1) does not infringe on any First Amendment rights of Wine & Spirits. So the only remaining question is whether it

infringes on any First Amendment rights of the individual stores that have been added as plaintiffs.

More specifically, the question is whether their rights, the rights of those individual stores, whether their rights of speech and/or association are violated by the prohibitions against common advertising and/or the use of a common name that are contained in Subsections III and VI of 3-5-11(b)(1).

Those Sections deem a Class A licensee to be a part of the chain store organization if it participates in a coordinated or common advertisement with one or more liquor license businesses in any advertising media and/or it uses any name, any term or name identified as a chain or common entity.

So the question is whether those provisions violate the speech or associational rights of the individual stores. I answer that question in the negative for several reasons.

First of all, neither of those provisions restricts the ability of individual licensees to speak or associate. The statute leaves the individual licensees free to advertise their products, and it places no limitations on the expressive content of their ads. They're free to advertise their products in any way that they wish to.

What the statute prohibits is the placement of common advertisements, which the evidence shows involves concerted activity by the licensees in agreeing, either expressly or tacitly, what products will or will not be advertised and what prices will be charged for those products.

The statute also leaves the licensees free to use any name that they choose as long as it does not identify them as a chain or common entity. Like the prohibition against common advertising, this limitation does not restrict the message that may be conveyed by the stores. Rater, it's directed solely at the kind of concerted activity that is

embodied in the use of a common name.

The use of a common name doesn't reflect anything more than an agreement to engage in the same type of concerted activity with respect to products and prices that is embodied in common advertising. There's no other reason to use a common name unless that's the case. Indeed, the evidence shows that this is precisely the means that the plaintiffs have used in order to circumvent the statutory prohibition against chain stores or franchise operations. Thus, as I stated earlier, each of the store s now has adopted the corporate name Douglas Wine & Spirits followed by a suffix indicating the town in which the store is located, for example, Douglas Wine & Spirits Cranston. Either Tri-State or one of the stores places an ad listing various products for sale and the prices for those products. The ad prominently displays the name "Douglas Wine & Spirits " and in barely noticeable fine print identifies the location of the store ostensibly placing the ad, there by conveying the impression that the ad is placed on behalf of All Douglas Wine & Spirits stores.

As I said before, an exact copy of the ad is displayed at every other Douglas store, and each other store displays or distributes material referring customers to the Douglas website.

Now, there was some evidence that material had previously been displayed in the window, was no longer displayed by some of the store s, but was -- by the new stores, I should say, but continued to be displayed in some of the older stores.

In short, the prohibitions against common advertising and the use of a common name do not impinge on the ability of the licensees to communicate their commercial message. The prohibitions merely prevent the kind of coordinated market activity that is reflected in common advertising and the use of the common name and that common advertising and use of the common name are

used to implement.

Put another way, what the statute restricts is not the content of the licensee's speech, but rather the concerted conduct that it evidences and that is embodied in it.

It is well-established that a prohibition against a particular type of conduct does not run afoul of the First Amendment simply because words may be among the means used in furtherance of that conduct. I believe it was the Supreme Court that said in the RAV versus City of St. Paul case, "Words can, in some circumstances, violate laws directed not against speech but against conduct. "And as the Supreme Court said in the Giboney case, "It has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language. Such an expansive interpretation of the constitutional guarantees of speech would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society. "Nor does the ban on franchise sales of liquor contained in 3-5-11.1(a) prevent Class A licensees from associating for any purpose except the purpose of engaging in concerted economic activity as a chain store organization.

As the First Circuit observed in its opinion, "Business entities have no First Amendment right to combine operations or coordinate market activities for the purpose of obtaining a greater market share for each participant." And in this respect, the ban is similar to the ban of sale of alcoholic beverages by chain stores, which, as I observed in the written decision denying the preliminary in junction, has been upheld by just about every Court in which the constitutionality of such a ban has been challenged.

Even if the statute is viewed as somehow burdening speech or anything that could be construed as speech, it

does not run afoul of the First Amendment. The speech, if that's what it is, at issue in this case is at most commercial speech because it proposes a commercial transaction, the sale of liquor by a retail establishment. But commercial speech is not protected by the First Amendment unless it concerns lawful activity and it is not misleading.

Here, the regulated activity that is the subject of the plaintiffs ads is their concerted action in establishing a list of products to be advertised and the prices to be charged for those products.

Now, while advertising by an individual licensee clearly would be lawful activity and commercial speech entitled to a measure of First Amendment protection, the same cannot be said of common advertising or the use of a common name, which has no independent expressive significance and amounts to nothing more than a means for carrying out the concerted activity, which is prohibited by statute.

To put it another way, common advertising and the use of a common name not only concerns unlawful activity, it is part and parcel of the unlawful activity.

Now, the plaintiffs claim that they operate their stores independently with each store making its own decision as to what products should be advertised and what prices to be charged, but that claim is at variance with the evidence and seems to the Court to be patently incredible. But even if that claim is to be credited, the use of the name Douglas Wine & Spirits prominently displayed in ads purportedly placed by individual stores would not be protected by the First Amendment, because in that event it would be misleading. It conveys and, obviously, is intended to convey to consumers the impression that all of the stores are part of a single entity and operate in concert, which if plaintiffs claim is credited would be untrue and, therefore, misleading.

There's another First Amendment claim that I'm not going to spend much time on because it hasn't been very well-developed and that is that the, this is Count III, that the First Amendment -- the statute violates the plaintiffs First Amendment rights because it contains or confers unfettered discretion on DBR. That's about all the Complaint says. It simply states that "Section 3-5-11 prohibition of chain stores permits unfettered discretion by the DBR in permitting some Class A licensees to engage in the prohibited activities while not permitting others." But neither the plaintiffs memorandum or the arguments of counsel provide much guidance regarding the precise nature of that claim. And while it is denominated as a First Amendment claim, it appears to the Court to be either a rehash of the equal protection claim, that is to say a selective enforcement claim, or some sort of an unarticulated due process claim, perhaps a claim that the statute is void for vagueness.

To the extent that the plaintiffs are seeking the stated equal protection or selective enforcement claim, I will consider that in connection with the discussion of the claims of Count VI. To the extent that the plaintiffs seek to assert a due process or a void for vagueness claim, I reject the claim on the ground it has not been adequately briefed, argued or supported by any evidence.

That brings me to the next claim, which is the Commerce Clause claim. I believe that's Count IV. The Commerce Clause prevents states from adopting regulations that discriminate against interstate commerce by treating it less favorably by intrastate commerce.

Not with standing the 21st Amendment, the ban on discrimination against interstate commerce applies to the sale of liquor as well as to the sale of other commodities. However, the State regulation of liquor sales does not necessarily run afoul of the Commerce Clause simply because it may have some incidental affect on interstate

commerce.

And this is where the 21st Amendment does have some significance. The 21st Amendment grants the states virtually complete control over whether to permit the importation of sale of liquor and how to structure the liquor distribution system if liquor sales are permitted.

So a state may entirely ban the importation of liquor; it may prevent anyone other than the State from selling liquor, as New Hampshire has done; or it may regulate the system by which liquor is distributed, as Rhode Island has done.

The Commerce Clause is implicated only where the regulation discriminates against interstate commerce by significantly favoring in-state commercial interests over out-of-state commercial interests. As the Supreme Court said in Granholm, if the State chooses to allow direct shipment of wine, it must do so on even-handed terms.

If the State law regulates in-state and out-of-state interests even-handedly, the statute passes muster under the Commerce Clause unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

The burden of establishing that a regulation is discriminatory rests on the party challenging it, in this case the plaintiffs.

The plaintiff may carry it s burden by showing either that the regulation on it s face discriminates against interstate commerce or out-of-state interests or that the regulation has the effect of so discriminating. And here the plaintiffs have failed to come close to showing either.

On their face, the statutory prohibitions against the sale of liquor by chain store organizations and/or franchise operations make no distinction whatever between in-state entities and out-of-state entities. Section 3-5-11(a) prohibits the issuance of a Class A license to any chain store organization which subsection (b)(l)

defines as any group of one or more holders of Class A liquor licenses that engage in any of the practices enumerated in that subsection.

Similarly, Section 3-5-11.1 prohibits the issuance of a Class A liquor license to any liquor franchisor or franchisee. The statute by its terms applies across the board regardless of whether the franchisee is local or out-of-state. Nor have the plaintiffs presented any evidence that, despite their facial neutrality, these Section s have the practical effect of discriminating against out-of-state sellers.

The plaintiffs argue that the prohibition against sales by chain store organizations and/or franchise operations is discriminatory because it prevents out-of-state chain store s and/or franchisees from selling in the Rhode Island market, and it cites the First Circuit's decision in Walgreen in support of that argument. But I find that argument to be both a logical non-sequitur and also to be based on a misreading of the holding in Walgreen.

While the statute does ban sales by franchisees as well as chain stores, it does so, as I've already said, with out regard to whether they are located in-state or out-of-state.

In fact, since Class A licenses may be obtained only by Rhode Island residents or entities, as a practical matter, the prohibition applies solely to in-state sellers, because they are the only ones that hold Class A licenses and, therefore, could seek to sell as franchisees. So by prohibiting franchise sales by anyone, the State has not conferred any competitive advantage on in-state sellers over out-of-state sellers, and the fact that the prohibition might have the incidental effect of preventing out-of-state interests as well as in-state interests from conducting franchise operations does not by it self establish discrimination against interstate commerce.

In this respect, the case is readily distinguishable from Walgreen, because in Walgreen the First Circuit

held that a Puerto Rico statute requiring that pharmacies seeking to open or relocate first obtain a Certificate of Necessity from the Commonwealth violated the Commerce Clause because it impermissibly discriminated against out-of-state pharmacies, but that decision was based on a number of factors not present in this case. One is that the Puerto Rico statute did not apply to existing pharmacies, 92 percent of which were locally owned. Another was that if anyone in Puerto Rico objected to an application for a Certificate of Necessity, the application process could be delayed for several years by administrative hearings and judicial review.

So the Court in Walgreen found that as a practical matter the Puerto Rico statute favored, and I quote, "the largely local group of established pharmacies over a similarly situated out-of-Commonwealth pharmacies seeking to open new stores," that's the end of the quote, by exempting them from the Certificate of Necessity requirement while simultaneously permitting them to prevent competition from what essentially the evidence in that case showed were out-of-state pharmacies by objecting to Certificate of Need applications.

Neither of those elements is present in this case. As already noted, the statute contains no exemption for local liquor stores. They're not exempt from the prohibition against franchising or operating chain store organizations, and, as I said, the fact that they're the only ones that come with in the reach of that prohibition at the present time.

Furthermore, Rhode Island licensees, and in particular local licensees, do not wield any power to delay or deny competition by franchise operations or chain store organizations either out-of-state or in-state. They cannot force a series of hearings or judicial delays. The statute flatly prohibits liquor sales by such entities whether or not existing licensees object.

The plaintiffs refer to the fact that 3-5-10, another

Section of the statute, allows Class A licenses to be issued only to Rhode Island residents or entities, and I've already mentioned that limitation. To the extent that this observation somehow is intended to buttress their Commerce Clause argument, it fails for two reasons.

First, the plaintiffs lack standing to challenge 3-5-10 because, as I've already said, All of the individual stores that are certainly, at least that are parties in this case, and I'm sure even those that aren't, are Rhode Island entities that already hold Class A licenses, and Wine & Spirits is not only a Rhode Island corporation, but Mr. Haronian testified that it has no desire to obtain a Class A license.

The second reason that 3-5-10 lends no support to the Commerce Clause argument is that whether a non-resident may obtain a Class A license has nothing whatever to do with the prohibition against chain stores and franchises, because even if an out-of-state entity could obtain a Class A license, it, like local Class A licensees, still would be prohibited from operating a chain store or participating in a franchise operation. So whether it is or is not constitutional for Rhode Island to only grant Class A licenses to local entities has no bearing whatsoever on the validity of the prohibition against franchises and chain stores.

That brigs me to Count V, the takings claim asserted under the Fifth Amendment. In Count V, the plaintiffs claim that 3-5-11(1) and 3-5-11. I take their property without just compensation, quote, "By eliminating the reasonable investment-backed property rights in their business and the value of their existing contractual relationship.

In order to prevail on a takings claim, the plaintiffs must establish, among other things, that some property of theirs was taken by the State. Governmental appropriation of physical property is not required to establish a taking. You don't have to show that the

Government took some physical property.

A regulation may rise to the level of a taking if it places a significant restriction upon an owner's use of his property for which justice and fairness require that compensation be given. In deciding whether a particular regulation constitutes a regulatory taking, a Court must consider the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the Government action. That's what Supreme Court said in the Kaiser-Aetna case.

In takings cases, whether they're physical or regulatory takings cases, Courts consider the extent to which the Government action interferes or interfered with the use of the affected property as a whole and not to the extent to which it has interfered with particular aspects or segments of that property.

In other words, for those of you who remember your property law days, it's whether the Government regulation interferes with the whole bundle of sticks or just one of the sticks in the bundle.

While the plaintiffs do not explain what reasonable investment-backed property rights have been taken, they presumably refer to their purported right to engage in franchise sales of liquor, but the franchise sale of liquor is not a reasonable investment-backed property right for several reasons.

First of all, in order to qualify as property with in the meaning of the Takings Clause, a claimed right must amount to something more than an abstract desire or hope of obtaining what is being claimed. And here, the plaintiffs never had any right to engage in the franchise sale of liquor. At most, they had a hope, and an unrealistic hope at that under the circumstances, of obtaining such a right.

The Rhode Island statute prohibiting chain store

organizations from selling liquor, as I said before, has been in effect since 1933, long before the plaintiffs began their operations. And while franchising per se was not banned under the previous version of the statute, chain store s were and the business conducted by the plaintiffs falls well within the definition of a chain store organization.

The fact that initially the Franchise Agreements may have been, I suppose, tacitly approved by the Department of Business Regulation's franchise division does not mean that the franchise sales of liquor were legal.

As was explained, the franchise division has no regulatory responsibilities with respect to liquor sales, and apparently was unaware of the prohibition against franchise sales of liquor s, was unaware that under Rhode Island law franchise sales of liquor is treated differently from franchise sales of other products.

In addition, the statute does not rise to the level of a regulatory taking of the plaintiffs' Class A licenses, because like other Class A licensees the plaintiffs can still operate their store s to sell liquor. All the statute does is close loopholes in the pre-existing prohibition against the sale of liquor by chain store organizations. It seeks to clarify what are deemed to be chain stores. I suppose absent these provisions there would be a claim that the statute was unconstitutional because it was vague, it didn't tell anybody what a chain store organization is. So it's sort of you're darned if you do, darned if you don't situation.

Furthermore, any expectation by the plaintiffs that they would have a right to engage in franchise liquor sales was patently unreasonable under the circumstances. The sale of liquor, as the cases have repeatedly said, is very heavily regulated, and it's unreasonable to expect that the regulations governing liquor sales will not be amended from time to time when necessary to close loopholes or to further the goals of the

regulation.

That brings me to the final claim, which is the equal protection claim set forth in Count VI.

Again, this claim was addressed by the Court and the Court of Appeals in connection with the denial of the preliminary injunction, at least in so far as Wine & Spirit s was concerned.

The allegations in Count VI setting forth the equal protection claim are just as sparse as the allegations made in connection with the other claims. Count VI simply asserts that Section s 3-5-11 and 3-5-11.1 deny fundamental rights to the plaintiffs and treat the plaintiffs differently from similarly situated individuals and businesses. The assertion regarding denial of fundamental rights was added by the Amended Complaint, but the plaintiffs failed to explain what fundamental rights they refer to, if there are any rights that haven't been -- that aren't the subject of other counts or, if so, how those rights may differ from the rights that are the subject of the other counts of the Complaint.

The assertion that the statue treats the plaintiffs differently from others similarly situated previously was rejected by this Court and the Court of Appeals, at least as far as Wine & Spirits was concerned. But undaunted by that rebuff and, apparently, unwilling to accept no for an answer, the plaintiffs attempt to relitigate the claim by now seeking to compare themselves to not restaurants and other similar enterprises as they did in the preliminary injunction hearing, but now to wineries, which hold farmer winery manufacturers licenses and/or brewpubs, which hold manufacturers Class BM licenses.

This apples-to- oranges comparison is similar to the comparison previously rejected by this Court and the Court of Appeals. As previously held, the Rhode Island statute is economic legislation that does not employ suspect classifications or impinge on fundamental rights.

So in order to prevail on their equal protection claim, the plaintiffs must show that the statute treats retail liquor stores holding Class A licenses differently from wineries, which hold farmer winery manufacturers licenses, and/or brewpubs that hold manufactures Class BM licenses and that the two types of establishments are so similarly situated that the difference in treatment is arbitrary and irrational.

The differences in treatment cited by the plaintiffs are that, First, wineries can sell their wines to multiple liquor stores, and, in addition, they can place advertisements identifying the liquor stores at which their wines may be purchased.

What the plaintiffs ignore is that neither of the two types of -- neither the two types of entities nor the activities in which they engage are comparable to the activities in which the plaintiffs engage.

The plaintiffs haven't presented any evidence that they are similarly situated to wineries or brewpubs, and it is apparent to even the casual observer that significant differences exist between, on the one hand, Class A liquor store licensees and wineries and brewpubs.

Wineries produce the wine that they sell, as do brewpubs, whereas liquor stores obtain the products that they sell through distributors. There's no evidence that in distributing their wine through liquor stores wineries engage in concerted activity with those stores to determine what wines the store s will advertise or what prices they will charge for those wines. There is no evidence of any affiliation between the wineries and the liquor stores with which they deal or that the wineries deal only with certain liquor stores, or that the liquor stores have to carry only the products of a particular winery. Nor is there any evidence that liquor stores within any geographic region have the exclusive right to obtain a winery's product within that region.

The plaintiffs also appear to base their equal

protection argument in part on what seems to me to be a selective enforcement claim that some other Class A licensees are permitted to use what the plaintiffs characterize as a common name.

So there was evidence presented that several stores previously operated by members of the Haxton family under the name Haxton's Liquor s have been permitted to continue operating under the names of their individual owners. They were required to change the names from Haxton's Liquor s to names such as Tom Haxton's Wine & Spirits, Mike Haxton's Wine & Spirits, Karen Haxton Kent Liquor Company and so forth. But Mr. Greer, the State's enforcement officer, explained the distinction between that and the plaintiffs use of the common name Douglas Wine & Spirits followed by a geographic location. He testified that the Haxton stores were owned by individuals using their own names. They used their own names, they were individuals using their own names, whereas the plaintiffs, at least under the present, are using and changed to the common name Douglas Wine & Spirits, and their names are distinguished only by the addition, usually in small letters, of the location of the city or town in which they're located.

Mr. Greer testified that the inclusion of the First names of the owners of the Haxton stores sufficiently distinguished one store from another and that simply appending to what otherwise is a common name the location of a particular store does not make that distinction.

The plaintiffs have failed to show that the distinctions are irrational, particularly in the absence of any evidence that the Haxton stores engage in common advertising, common pricing or any of the other concerted activities in which the plaintiffs engage.

Furthermore, the plaintiffs have failed to show that the alleged activity and prosecution was based on impermissible considerations such as race, religion,

intent to inhibit or punish the exercise of constitutional rights or malicious bad faith intent to injure. Those are all generally required, or at least one of those is required to make out a claim of selective prosecution.

So for all of the foregoing reasons, this Court finds that, first of all, in exercising its authority to regulate the sale of alcoholic beverages, Rhode Island did not act irrationally in prohibiting sales by chain store organizations and/or franchise operations; that as evidenced by the techniques utilized by plaintiffs in attempting to circumvent that ban, the prohibitions in Section 3-5-11 of concerted activities characteristic of chain store operations are necessary to implement that ban; that those prohibitions do not infringe on any of the plaintiffs constitutionally protected rights of speech and/or association; that the statute does not discriminate against interstate commerce; that neither the statute or the manner in which it is interpreted or enforced violates the plaintiffs right to equal protection; and that the ban does not constitute any taking of any property of the plaintiffs.

For all of the foregoing reasons, judgment may enter in favor of the defendants, denying and dismissing all of the plaintiffs claims.

The Court will be in recess.

(Court concluded at 4:15 p.m.)

CERTIFICATION

I, Anne M. Clayton, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/
Anne M. Clayton, RPR

Date

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 06-2224

WINE AND SPIRITS RETAILERS, INC., ET AL.,
Plaintiffs, Appellants,

v.

WINE AND SPIRITS RETAILERS, INC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

[Hon. Ernest C. Torres, U.S. District Judge]

Before

Selya, Circuit Judge,
Hill,* Senior Circuit Judge,
and Lynch, Circuit Judge.

Evan T. Lawson, with whom Robert J. Roughsedge, Michael Williams, and Lawson & Weitzen, LLP were on brief, for appellants.

Rebecca Tedford Partington, Deputy Chief, Civil Division, Department of Attorney General, with whom Patrick C. Lynch, Attorney General, was on brief, for state appellees.

*Of the Eleventh Circuit, sitting by designation.

Joseph S. Larisa, Jr., with whom Larisa Law and Consulting, LLC was on brief, for intervenor-appellee.

August 10, 2005

SELYA, Senior Circuit Judge. Rhode Island, like many states, regulates the intrastate channels through which alcoholic beverages may be manufactured, imported, and sold. One recently enacted piece of this regulatory mosaic prevents any franchisor or franchisee from holding a Class A retail liquor license. See R.I. Gen. Laws § 3-5-11.1. Another piece, enacted at the same time, amended a related statute, which prohibits any "chain store organization" from holding such a license, id. § 3-5-11(a), so that it explicitly encompasses package stores that engage in certain coordinated business activities, see id. § 3-5-11(b).

Plaintiff Wine & Spirits Retailers, Inc. (W & S), a franchisor of package stores, brought this action against the State seeking, inter alia, to enjoin the enforcement of those new enactments.[1] W & S premised its suit on the thesis that the two statutes, singly and in combination, violate (i) its First Amendment rights to speech and association and (ii) its Fourteenth Amendment right to equal protection.

In this early chapter of the litigation, W & S appeals from the district court's denial of its motion for a preliminary injunction. Having weighed the considerations relevant to the preliminary injunction

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[1]Posturing this action as one brought by W & S against the State is a harmless oversimplification. In fact, W & S's principal, John Haronian, is also a plaintiff and Jeffrey J. Greer, in his official capacity as associate director of Rhode Island's Department of Business Regulation, is also a defendant. Because their presence is essentially superfluous, we opt for simplicity and proceed as if W & S and the State were the only parties.

balance, we conclude that the district court did not abuse its discretion in determining that W & S failed to show a likelihood of success on the merits of its claims and, therefore, did not demonstrate an entitlement to preliminary injunctive relief.

I. BACKGROUND

Under Rhode Island law, any individual or entity engaged in the manufacture, sale, or importation of alcoholic beverages must hold a valid license issued by the Department of Business Regulation (DBR). See R.I. Gen. Laws § 3-5-1. A Class A retail license entitles the holder to obtain alcoholic beverages from licensed wholesalers and to operate a retail package store, from which the beverages may be sold in sealed containers. See id. §§ 3-7-1, 3-7-3. Since 1933, the State has prohibited chain store organizations from holding Class A liquor licenses. See 1933 R.I. Pub. Laws ch. 2013, § 6 (current version at R.I. Gen. Laws § 3-5-11). This enactment gave the DBR full discretion to determine whether an entity fell into the "chain store" category. Id.

The ingenuity of lawyers is nearly endless and, recently, franchised package stores began to crop up throughout Rhode Island. In an apparent effort to block this easy evasion of the chain store prohibition, the Rhode Island General Assembly amended section 3-5-11 to identify a set of licensee activities that would allow the DBR to find that an entity was in fact a chain store organization. The new statute, enacted July 8, 2004 and effective April 1, 2005, expanded the term "chain store organization" to encompass:

> Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices:

> (i) Common, group, centralized or coordinated purchases of wholesale merchandise.
>
> (ii) Common billing or utilization of the services of the same person or the same entity in the management or operation of more than one liquor licensed business.
>
> (iii) Participation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media.
>
> (iv) Coordinated or common planning or implementation of marketing strategies.
>
> (v) Participation in agreed upon or common pricing of products.
>
> (vi) Any term or name identified as a chain or common entity.

R.I. Gen. Laws § 3-5-11(b)(1). By its terms, this statute restricts a holder of a Class A liquor license from participating in many business activities that are typical of a franchise relationship.

Simultaneous with the enactment of section 3-5-11(b), the General Assembly passed what is now section 3-5-11.1. This provision has a similar but more direct effect: it explicitly excludes franchisees from holding Class A liquor licenses. The amended statute reads in pertinent part:

> To promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing. Class A liquor license[s] authorized by this title shall not be granted, issued, renewed or transferred to or for the use of any liquor franchisor or franchisee. Class A liquor license holders are expressly prohibited from utilizing the provisions of the Franchise Investor [sic] Act, [R.I. Gen. Laws] § 19-28-1 et seq.

Id. § 3-5-11.1(a). The latter statute also nullifies all franchise agreements involving the retail sale of alcoholic beverages, id. § 3-5-11.1(b); stipulates that any franchisor or franchisee who is a party to such an agreement must terminate it within thirty days of the statute's effective date, id. § 3-5-11.1(c)); and empowers the DBR to fine violators (including franchisors) and to revoke or suspend a transgressor's liquor license and/or franchise registration, id. § 3-5-11.1(d).

At the time these bills were passed, W & S had been operating for roughly seven years as a franchisor of independently owned Class A liquor retailers. It had a portfolio of eleven franchise agreements in Rhode Island, all of which were registered under the Franchise Investment Act, R.I. Gen. Laws §§ 19-28.1-1 to 19-28.1-34. These franchisees conducted business under names owned by W & S (seven under the name "Douglas Wine & Spirits" and four under the name "People's Liquor Warehouse").

In general, W & S's franchise agreements provided that, for an annual fee, royalties, a commitment to maintain certain quality standards, and a pledge to pay into a joint advertising and promotion fund, the franchisee would receive an exclusive franchise territory. The franchisee also would receive the right to use either the Douglas or People's trade name and other proprietary marks, and would be given access to a compendium of marketing, advertising, training, accounting, purchasing, and consulting services. Additionally, the franchise agreements authorized W & S to require the franchisees to carry certain products, to designate vendors for those items, and to dictate the layout of each retail store (including product placement).

In July of 2004 (when sections 3-5-11(b) and 3-5-11.1 were enacted), W & S was negotiating with two more potential Rhode Island franchisees. Recognizing the relevance of the new statutes to its operation, W & S

wrote to the DBR on August 12, 2004, asking whether it would be permissible to register those two new franchises prior to the statutes' effective date. The DBR responded on September 1, 2004, explaining that W & S would have to submit applications in order for any new franchise registrations to be considered. The DBR's letter left no doubt that this would be an exercise in futility; the epistle declared the DBR's position to be "that as of April 1, 2005, all store franchise agreements as of that time will become null and void and it [thereafter] will be illegal for a Class A package store to operate under a franchise agreement."

II. TRAVEL OF THE CASE

With the death knell set to toll, W & S filed this action on September 29, 2004. Its complaint set forth eight statements of claim. On January 18, 2005, W & S moved to enjoin enforcement of the challenged provisions throughout the currency of the litigation. In the motion for preliminary injunctive relief, it relied on only three of its eight claims: (i) that sections 3-5-11 and 3-5-11.1 prohibit it from engaging in expression protected by the First Amendment; (ii) that the laws violate its First Amendment right to association; and (iii) that the laws violate the Equal Protection Clause of the Fourteenth Amendment by treating it differently from others who are similarly situated. The State opposed the motion. The United Independent Liquor Retailers of Rhode Island (UILRRI), an association of Class A licensees that had lobbied for passage of the challenged laws, successfully moved to intervene as a party defendant and sided with the State.

Following a hearing, the district court denied the request for a preliminary injunction, principally on the ground that W & S had not demonstrated a likelihood of success on the merits. See Wine & Spirits Retailers, Inc. v. Rhode Island, 364 F. Supp. 2d 172, 176-83 (D.R.I. 2005). W & S filed a timely notice of appeal. See Fed. R.

App. P. 4(a); 28 U.S.C. § 1292(a)(1). We granted expedited review.

In the meantime, the district court had granted an injunction pending appeal, see Fed. R. Civ. P. 62(c)), to prevent the State "from enforcing R.I. Gen. Laws § 3-5-11 to the extent that the enforcement action is based solely on a Class A licensee's use of a name similar to or the same as that of another licensee." Wine & Spirits Retailers, Inc. v. Rhode Island, No. 04-418 (D.R.I. April 29, 2005) (unpublished order). At W & S's request, we extended that injunction to the date of the issuance of our mandate but, like the lower court, denied other requested relief. See Wine & Spirits Retailers, Inc. v. Rhode Island, No. 05-1549 (1st Cir. May 23, 2005) (unpublished order); see also Fed. R. App. P. 8(a)(2). We heard oral argument on June 7, 2005 and took the matter under advisement. We now affirm.

III. JUSTICIABILITY

W & S maintains that the district court wrongfully denied its request for a preliminary injunction against the enforcement of sections 3-5-11 and 3-5-11.1. Both the State and UILRRI assert that W & S lacks Article III standing to challenge those laws.

It is axiomatic that Article III standing is a constitutional precondition to a federal court's power to adjudicate a case. Osediacz v. City of Cranston, ___ F.3d ___, ___ (1st Cir. 2005) [No. 04-2673, slip op. at 2]; R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 30 (1st Cir. 1999). When standing is put in issue, a reviewing court is warranted in confirming its existence before proceeding to tackle the merits of the case. We do so here.

The burden of establishing standing lies with the party invoking federal jurisdiction. Osediacz, ___ F.3d at ___ [slip op. at 3]. Accordingly, W & S "must show that (1) it personally has suffered some actual or threatened injury, (2) the injury fairly can be traced to the challenged

conduct, and (3) a favorable decision likely will redress [the injury]." R.I. Ass'n of Realtors, 199 F.3d at 30.

W & S easily satisfies these requirements with respect to section 3-5-11.1. After all, it alleges that section 3-5-11.1's prohibition on liquor franchises nullifies its franchise agreements with no fewer than eleven franchisees and subjects it, as a franchisor, to monetary penalties should it attempt to maintain its franchise relationships. See R.I. Gen. Laws § 3-5-11.1(b), (d). Those imminent consequences satisfy the requirement of an injury in fact. That injury, in turn, is fairly traceable to the statute and redressable in a federal court proceeding. Consequently, W & S has standing to press its constitutional claims insofar as those claims implicate section 3-5-11.1.

With respect to section 3-5-11, the defendants' cardinal contention is that W & S cannot meet the standing requirement because it does not itself hold a Class A liquor license and, therefore, is not subject to any enforcement action or penalty under the statute's terms. This contention has a patina of plausibility. Section 3-5-11 does not carry any direct penalties applicable to franchisors but, rather, applies directly to holders of Class A liquor licenses. Thus, it cannot be enforced against a franchisor, like W & S, which does not itself possess such a license.

In the end, however, this statutory configuration does not undermine the allegation that W & S has suffered an injury that is fairly traceable to the statute. That allegation draws its essence from W & S's claim that section 3-5-11, by restricting the holders of Class A liquor licenses from engaging in certain business activities vital to franchise arrangements, infringes on a franchisor's First Amendment rights of speech and association and thereby causes W & S economic harm. No more is exigible to clear the standing hurdle.

The requirement that an alleged injury be fairly traceable to the defendant's action does not mean that the defendant's action must be the final link in the chain of events leading up to the alleged harm. See Bennett v. Spear, 520 U.S. 154, 168-69 (1997). Nor does that requirement exclude injuries produced by "coercive effect upon the action of someone else." Id. at 169. Given these principles, the fact that the deleterious effect of a statute is indirect will not by itself defeat standing. See Becker v. FEC, 230 F.3d 381, 387 (1st Cir. 2000); see also Eulitt v. Me. Dep't of Educ., 386 F.3d 344, 353 (1st Cir. 2004) (holding that parents had sufficiently alleged an Article III injury even though "it [was] the educational institution, not the parent[s]," that was denied access to certain tuition payments under the challenged statute); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 183 (1st Cir. 1999) (finding that trash hauler had standing to assert a constitutional challenge to an ordinance mandating residents' use of a town-designated competitor); Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 972 (1st Cir. 1993) (finding that client had standing based on alleged injury to her constitutional rights that was fairly traceable to a rule, enforceable only against attorneys, that required them to place client funds in a pooled interest-bearing account).

These precedents are determinative here. Section 3-5-11(b)(1) has an obviously coercive effect on W & S's franchisees; under its terms, those franchisees either must desist from engaging in certain collective business activities with W & S or forfeit their Class A liquor licenses. Either way, W & S's business relationship with the franchisees, which it claims to be constitutionally protected, is damaged.[2] Consequently, the economic harm

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[2] There is no suggestion here that any of W & S's franchisees plan to terminate the franchise relationships for reasons unrelated to the threatened enforcement of the new statutory provisions. Therefore, this is not a case in which "the injury complained of is 'th[e] result [of] the independent action of some third party not before the court.'"

that W & S alleges is fairly traceable to the statute (and, thus, to the State).

To cinch matters, the threat to the franchisees is both actual and imminent. It is undisputed that the DBR has taken preliminary steps to enforce the statute against non-compliant holders of Class A liquor licenses and has warned that it will undertake such enforcement from and after the statute's effective date. That is enough to show that the threatened harm is imminent. See, e.g., Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 65-66 (1st Cir. 2005); Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 976 (1st Cir. 1989); see also Berner v. Delahanty, 129 F.3d 20, 24 (1st Cir. 1997) (noting that to ground a claim of standing, harm must be actual or imminent rather than conjectural or speculative). Granting the requested declaratory and injunctive relief plainly would palliate this threatened harm.

To say more on this point would be to paint the lily. For the reasons elucidated above, we conclude, without serious question, that W & S has alleged an injury fairly traceable to each of the challenged statutes and redressable by the federal courts. Accordingly, it has standing to pursue the claims that it asserts.

IV. THE PRELIMINARY INJUNCTION STANDARD

We turn next to the legal standards that apply to the grant or denial of preliminary injunctions. A district court must weigh four factors in determining whether to issue a preliminary injunction:

> (1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the

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Bennett, 520 U.S. at 169 (alterations and emphasis in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

> hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (1st Cir. 2004) (citing Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996)). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002).

This court reviews the grant or denial of a preliminary injunction for abuse of discretion. Bl(a)ck Tea Soc'y, 378 F.3d at 11; Ross-Simons, 102 F.3d at 16. Under that rubric, findings of fact are reviewed for clear error and issues of law are reviewed de novo. Air Line Pilots Ass'n, Int'l. v. Guilford Transp. Indus., Inc., 399 F.3d 89, 95 (1st Cir. 2005); New Comm Wireless Servs., 287 F.3d at 9. Judgment calls and issues that demand the balancing of conflicting factors are reviewed deferentially. Bl(a)ck Tea Soc'y, 378 F.3d at 11. In the last analysis, then, we will set aside a district court's ruling on a preliminary injunction motion only if the court clearly erred in assessing the facts, misapprehended the applicable legal principles, or otherwise is shown to have abused its discretion. McGuire v. Reilly, 260 F.3d 36, 42 (1st Cir. 2001).

V. THE FIRST AMENDMENT CHALLENGE

W & S asserts that sections 3-5-11 and 3-5-11.1 impair its First Amendment rights to free speech and expressive association by (i) constricting its ability to peddle marketing and management advice, advertising services, and trade name protection to holders of Class A liquor licenses and (ii) making it unlawful to engage in a franchise relationship with those license holders. We consider these assertions separately.

A. The Free Speech Claim.

The Free Speech Clause provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. By incorporation through the Fourteenth Amendment, this prohibition applies to states and their political subdivisions. Knights of Columbus v. Town of Lexington, 272 F.3d 25, 30 (1st Cir. 2001).

In this case, W & S directs its free speech claim to section 3-5-11(b)(1). It asseverates that various provisions of that section adversely affect its ability to sell business advice (sub-paragraphs (i), (ii), (iv), and (v)), advertising design and placement services (sub-paragraph (iii)), and trade name rights (sub-paragraph (vi)) to the holders of Class A liquor licenses. Thus, the law unduly infringes on W & S's right to communicate with the license holders. We examine this asseveration.

As an initial matter, we assess each of the activities identified by W & S in light of its allegation that section 3-5-11(b)(1) operates to prohibit or unduly curtail the activity. We then consider the contention that the activity constitutes protected speech or expressive conduct.

1. Business Advice. W & S maintains that the provision of business advice for a fee is speech protected by the First Amendment. The advice in question takes the form of a marketing and management plan (including recommendations about purchasing and pricing). The Supreme Court has recognized that some profit-directed speech, such as legal or medical advice, is entitled to constitutional protection. See Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989). Here, however, we need not determine whether and to what extent the business advice offered by W & S to Class A license holders fits within this taxonomy. The plain, hard fact is that section 3-5-11(b)(1) simply does not prohibit the communication of advice between a franchisor and the holders of Class A liquor licenses.

To begin, nothing in the statute prevents W & S from selling or otherwise communicating its recipe for the operation of a successful package store to a Class A license holder. Nor does the statute forbid a license holder from purchasing or receiving that information. While the statute prevents certain conduct — the implementation of W & S's business model — that prohibition imposes no legally cognizable burden on the exchange of information between the speaker (W & S) and the invited audience (the holders of Class A liquor licenses).

Stripped of rhetorical flourishes, W & S's real complaint is that section 3-5-11(b)(1) will have the incidental effect of suppressing or eliminating the market demand for the particular type of business advice that W & S offers (that is, marketing and management strategies whose successful implementation requires the coordination of business activities with those of other market players). That circumstance does not suffice to hoist the red flag of constitutional breach: the First Amendment does not guarantee that speech will be profitable to the speaker[3] or desirable to its intended audience. See AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. P'ship, 6 F.3d 867, 871 (2d Cir. 1993); see also Young

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[3] A case like this one, in which the statute imposes no burden on the communication between the speaker and the intended audience but has the effect of decreasing the audience's demand for a particular kind of business advice, is distinguishable from cases dealing with the State's direct imposition of financial burdens on the dissemination of particular kinds of speech. See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115-18, 123 (1991) (invalidating law requiring publisher to place convicted criminals' income derived from publications about their crimes into escrow for victim compensation); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev., 460 U.S. 575, 581-83 (1983) (finding that tax on paper and ink products consumed in newspaper production imposed an unconstitutional burden on freedom of the press). In such cases, the government, not waning market demand, was directly responsible for the financial disincentive to speak.

v. Am. Mini Theatres, Inc., 427 U.S. 50, 78 (1976) (Powell, J., concurring) (noting that "[t]he inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [the challenged] ordinance upon freedom of expression").

By the same token, the First Amendment does not safeguard against changes in commercial regulation that render previously profitable information valueless. That is a commonplace occurrence in today's fast-moving world (an example would be the closing of a tax loophole that renders a previously profitable tax shelter worthless). The First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit or with the listener's ability to act upon the communication.

That ends this aspect of the matter. Because section 3-5-11(b)(1), on its face, imposes no burden on the ability of a business advisor to relay marketing and management advice to holders of Class A liquor licenses, W & S is unlikely to succeed on this facet of its First Amendment claim.

2. Advertising Services and Trade Names. W & S suggests that section 3-5-11(b)(1)(iii)'s proscription on the ability of the holders of Class A liquor licenses to participate jointly "in a coordinated or common advertisement" and section 3-5-11(b)(1)(vi)'s prohibition on a license holder's use of "[a]ny term or name identified as a chain or common entity" constitute undue restraints on commercial speech. We take no view on that suggestion for two reasons: first, it would require us to examine the commercial speech rights of Class A licensees — none of whom are before this court — and second, W & S has not established any basis upon which it can assert those rights on behalf of third parties (including its franchisees). The only question properly before us is narrower: whether the joint advertising and common naming restrictions infringe on any speech or

expressive conduct of W & S that is protected by the First Amendment. We answer that question in the negative.

Let us be perfectly clear. We agree with W & S's underlying premise that commercial speech, including truthful liquor advertising, is entitled to a measure of protection under the First Amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501, 516 (1996); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). We nonetheless reject W & S's suggestion because, in performing its role in the activities in question, it does not engage in commercial speech.

The activities that W & S claims to be protected as commercial speech are its provision of advertising services, including designing advertisements, arranging for their placement in various media, and licensing the common use of trade names that, according to W & S, have become synonymous with quality and value. See Appellants' Br. at 5, 8; see also Wine & Spirits, 364 F. Supp. 2d at 177. The commercial speech doctrine protects the communication of truthful information to potential customers about a proposed commercial transaction. See Fox, 492 U.S. at 482; Cent. Hudson, 447 U.S. at 561-63. W & S's assertions do not amount to a claim that the joint advertising and common naming restrictions impede its right to communicate with its potential customers, rather, the claim is that those restrictions interfere with a right to provide certain services. The provision of advertising and licensing services is not speech that proposes a commercial transaction and therefore does not constitute commercial speech. See Fox 492 U.S. at 482 (distinguishing between the proposal of a commercial transaction, "which is what defines commercial speech," and the provision of certain services for a profit, which is not commercial speech).

Nor do these activities — W & S's creation of advertisements, assistance in their placement, and facilitation of the use of its trade names by franchisees — fall into the broader category of expressive activity in which conduct itself can be said to convey a particularized message and, thus, be entitled to protection as symbolic speech. See United States v. O'Brien, 391 U.S. 367, 376-77 (1968); see generally Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569-70 (1995) (discussing instances in which the Supreme Court has found conduct to be inherently communicative). It is the duty of the party seeking to engage in allegedly expressive conduct to demonstrate that the First Amendment applies to that conduct. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 n.5 (1984). W & S has offered no plausible argument as to why the provision of advertising services is an inherently expressive activity.

Of course, W & S also complains that the advertising and common naming restrictions infringe on the franchisees' rights jointly to propose retail liquor sales through newspaper advertisements and the like. Though loudly bruited, that complaint lacks force because W & S has not established standing to pursue it.

A party ordinarily has no standing to assert the First Amendment rights of third parties. See Eulitt, 386 F.3d at 351. While there is an isthmian exception that applies when some barrier or practical obstacle deters a third party from asserting its rights, see, e.g., Powers v. Ohio, 499 U.S. 400, 414-15 (1991) (allowing criminal defendant to assert rights of jurors because they lack financial incentive to undertake the burden of litigation), nothing in the record indicates that W & S's franchisees are unable or unlikely to protect their own rights.

In some circumstances, out of concern that an overly broad statute might chill constitutionally protected speech, the Supreme Court has relaxed the prudential

limitations on third-party standing to permit a litigant to pursue a facial challenge to such a statute on overbreadth grounds, even though the litigant's own conduct could be regulated validly by a more narrowly drawn statute. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Here, however, any assertion that the advertising and common naming provisions substantially overreach would fail because the overbreadth doctrine is inapplicable in the commercial speech context. See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496-97 (1982); Bates v. State Bar of Ariz., 433 U.S. 350, 380-81 (1977).

To recapitulate, W & S has not laid any groundwork sufficient to establish third-party standing, so it cannot assert the commercial speech rights of Class A license holders. W & S's spavined attempt to assert a facial challenge affords no safety net for this claim. Accordingly, we endorse the district court's conclusion that W & S's free speech claim has little chance of succeeding on the merits.

B. The Freedom of Association Claim.

W & S strives to persuade us that the challenged statutes, by directly and indirectly prohibiting the holders of Class A liquor licenses from engaging in franchise relationships, impinge on its First Amendment right to associate with its franchisees for the purposes of joint advertising and development of common management and marketing strategies. We are not convinced.

The Supreme Court long has recognized that freedom of speech embraces the "freedom to engage in association for the advancement of beliefs and ideas." NAACP v. Alabama, 357 U.S. 449, 460 (1958). This freedom of expressive association emerges from the insight that expressive rights explicitly guaranteed by the First Amendment "could not be vigorously protected from interference by the State unless a correlative freedom to

engage in group effort toward those ends were not also guaranteed." Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984). Because protection of the right to associate evolves from the First Amendment's guarantees of speech, assembly, petition, and free exercise, the scope of protection for association corresponds to the constitutional solicitude afforded to the mode of First Amendment expression in which a particular group seeks collectively to engage. See id.

It follows logically that, in a free speech case, an association's expressive purpose may pertain to a wide array of ends (including economic ends), see id., but the embedded associational right protects only collective speech and expressive conduct in pursuit of those ends; it does not cover concerted action that lacks an expressive purpose, see City of Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989). So viewed, the right to expressive association does not confer a generalized freedom for individuals or entities collectively to engage in activity that is otherwise regulable when undertaken by a single individual or entity. See id. As one treatise has noted, "[t]he Court has tended to view the right of association as dependent on underlying individual rights of expression; there is no right of association in the abstract." Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 1337 (14th ed. 2001). Thus, W & S must demonstrate that sections 3-5-11 and 3-5-11.1 unduly curtail its associational right to engage in activities protected by the First Amendment. Elsewise, it cannot prevail on its associational claim.

We already have explained why section 3-5-11(b)(1) does not violate any of W & S's speech rights. See supra Part V(A). The question, then, reduces to whether section 3-5-11.1 may be said to work such a violation. To this end, W & S labors to characterize its concerted business activities as speech or expressive conduct protected by the First Amendment. That effort fails.

Business entities have no First Amendment right to combine operations or coordinate market activities for the purpose of obtaining a greater market share for each participant. The fact that communication serves as the primary instrument of conducting business among separate enterprises does not alter this conclusion. The Supreme Court elaborated on this point more than half a century ago in Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

The Giboney Court acknowledged that, although courses of conduct are, in most instances, effectuated by speaking or writing, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." Id. at 502. Indeed, "[s]uch an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society." Id.; see also Calif. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513-15 (1972) (explaining that while communication is an integral part of joint conduct, that fact cannot be used as a pretext for obtaining immunity from laws prohibiting anticompetitive commercial activities). After all, the Court has made clear that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (citing "the exchange of price and production information among competitors" as an example of "communications that are regulated without offending the First Amendment").

Against this backdrop, we turn to the case at hand. In enacting section 3-5-11.1, Rhode Island exercised its

police power, including its power under the Twenty-First Amendment,[4] to regulate commercial transactions involving liquor and the organizational structure of the market in which such transactions take place. Seen in this light, the statute is tantamount to an antitrust law — a category of regulation that recognizes the authority of the State to adjust the distribution of market power among commercial entities so as to prevent conditions that are, in its reasonably held view, harmful to healthy competition and free trade.

It is black letter law that "the constitutionality of the antitrust laws is not open to debate." Calif. Motor Transp., 404 U.S. at 515. Such laws, by definition, regulate the ways in which market players may pool their capabilities to acquire market power. While the State cannot regulate the right of speakers to band together to convey a common message in the marketplace of ideas, it most assuredly can exercise control over the efforts of market players to exploit the principle of strength in numbers in the marketplace of goods. See U.S. Jaycees, 468 U.S. at 638 (O'Connor, J., concurring) (positing that "there is only minimal constitutional protection of the freedom of commercial association," id. at 634, and that, in all events, "no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association"); Kathleen M. Sullivan, Free Speech and Unfree Markets, 42 U.C.L.A. L. Rev. 949, 950 (1995) (observing that, in the modern constitutional order, legislatures are free to pass laws "that override private economic arrangements on allocative grounds — such as correcting for collective action problems, externalities, information asymmetries,

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[4] In pertinent part, that amendment prohibits "[t]he transportation or importation . . . for delivery or use . . . of intoxicating liquors [into any state]" in violation of state law. U.S. Const. amend. XXI, § 2.

or monopolies — or for reasons of redistribution or paternalism").

The case law dealing with claimed exceptions to antitrust or commercial conspiracy laws on First Amendment associational grounds indicates that the State's right to enforce such laws against collusive market behavior must abate only in instances in which the joint activity constitutes an exercise of a core speech right. In Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Supreme Court recognized that commercial actors' concerted petitioning for legislative change was a form of political expression protected by the First Amendment and, therefore, exempt from certain applications of the antitrust laws. Id. at 136-38. In NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), where black citizens had banded together to boycott white merchants as a means of protesting discriminatory practices, the Supreme Court held that the merchants could not premise liability for state antitrust violations and common law conspiracy on the boycotters' collective exercise of First Amendment rights. See id. at 890-92, 915, 933. Finding that the boycott involved the exercise of core First Amendment rights (speech, petition, and assembly), the Court ruled that the State's right "to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution." Id. at 914. Several other cases in that lineage also turned on the fact that the concerted activity implicated exceptions to the antitrust laws designed to protect core speech rights. See, e.g., Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56-60 (1993) (explaining that antitrust liability cannot be imposed upon entities that collectively pursue objectively reasonable litigation, even when an anticompetitive intent motivates the suit); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669-70

(1965) (decreeing that antitrust laws cannot be interpreted to prohibit joint efforts to influence public officials through otherwise legal methods).

These cases must be contrasted with cases such as FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990), in which the Court upheld the imposition of an injunction under the Sherman Act against a cadre of court-appointed lawyers that enjoined their concerted refusal to accept further case assignments pending a requested fee increase. See id. at 426-36. The Court explained that "the undenied objective of [the] boycott was an economic advantage for those who agreed to participate," id. at 426, and that the lawyers' joint activity was aimed at "profit[ing] financially from a lessening of competition in the boycotted market," id. at 427 (internal quotation marks omitted). In those circumstances, the Court refused to accept the lawyers' claim that the law, as applied, violated their right to associate for expressive purposes because to do so would be to "exaggerate[] the significance of the expressive component in the [lawyers'] boycott." Id. at 430. In the absence of anything uniquely expressive about the concerted commercial activity, no First Amendment exception to the enforcement of an otherwise valid antitrust law was warranted. Id. at 431 (noting that "[t]he most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude"); accord Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697 (1978) (upholding, against a First Amendment challenge, an antitrust injunction that prohibited a professional society "from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical").

Here, it is nose-on-the-face plain that W & S's commercial conduct exhibits nothing that even the most vivid imagination might deem uniquely expressive. Certainly, the mere fact that the joint activities that

define the business relationship between the franchisor and its franchisees have some communicative component cannot, in and of itself, establish an entitlement to the prophylaxis of the First Amendment. See Superior Court Trial Lawyers, 493 U.S. at 430. Consequently, that conduct does not warrant overriding the State's historic right to regulate market forces in the retail liquor industry.[5]

In sum, W & S has not established that the neoteric laws prohibiting the holders of Class A liquor licenses from conducting joint business activities infringe upon any right to advance its beliefs or ideas by engaging in activities protected by the First Amendment. Accordingly, there is scant reason to believe that W & S can succeed on the merits of its freedom of expressive association claim.

VI. THE EQUAL PROTECTION CLAIM

As a last resort, W & S mounts an equal protection challenge to sections 3-5-11 and 3-5-11.1. Its complaint is that these statutes apply to package stores but not to other entities licensed to sell alcoholic beverages at retail (such as restaurants and bars). Its contrived attempt to tease an equal protection violation out of this imperfect analogy is unpersuasive.

When economic legislation neither employs suspect classifications nor infringes on fundamental rights, the legislation need only survive rational basis scrutiny. Hodel v. Indiana, 452 U.S. 314, 331 (1981). Under that standard, an inquiring court must uphold the legislation as long as the means chosen by the legislature are

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[5] The conclusion that otherwise valid regulation of commercial interactions between business entities does not offend the First Amendment merely because such interactions have a communicative component would apply with equal force to our analysis in Part V(A)(1), had we found that the relevant sub-paragraphs of section 3-5-11(b)(1) did in fact impede communications between W & S and the holders of Class A liquor licenses.

rationally related to some legitimate government purpose. Id. In conducting that analysis, the State's legislative choices "bear[] a strong presumption of validity." Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 47 (1st Cir. 2003) (internal quotation marks omitted). A challenger can overcome this presumption only by "demonstrating that there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged classification and the government's legitimate goals." Eulitt, 386 F.3d at 356.

These rules are dispositive here. The legislation at issue is economic in nature. It neither utilizes suspect classifications nor trenches upon fundamental rights.[6] Its purpose, as stated by the Rhode Island General Assembly, is to protect consumer choice and ensure the equitable pricing of retail liquor products. See R.I. Gen. Laws § 3-5-11.1(a). W & S has not explained why, given the unexceptionable goal of maintaining a competitive retail liquor industry, it is irrational for Rhode Island to enact measures aimed at preventing anticompetitive practices by ensuring that holders of Class A liquor licenses operate independently. By like token, W & S has wholly failed to show that restaurants and bars (which are licensed to sell alcoholic beverages only for consumption on their licensed premises) are similarly situated entities vis-□-vis package stores (which are licensed to sell alcoholic beverages only in sealed containers and for off-premises consumption).[7]

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[6] To be sure, W & S contends that the challenged statutes burden its fundamental rights of speech and association. We dismiss that contention out of hand. See supra Part V (establishing that the challenged statutes do not impermissibly impinge upon W & S's First Amendment rights).

[7] Even in the improbable event that the two markets were to be deemed substantially similar, that showing alone would not ensure W & S's success. Regulation must start somewhere. See FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 316 (1993) (explaining that "the legislature must be allowed leeway to approach a perceived problem incrementally").

Finally, it has failed to support its contention that Rhode Island's decision to devise a special regulatory scheme for the retail liquor market is arbitrary; for example, it has not negated the possibility that healthy competition already exists with respect to other sectors of the liquor industry (thus rendering regulation unnecessary).

The short of it is that W & S has not demonstrated that the challenged legislation lacks a rational basis. Accordingly, the district court did not miscalculate in finding it improbable that W & S would prevail on its equal protection claim.

VII. CONCLUSION

We need go no further. W & S has not shown that it is likely to succeed on the merits of any of its claims. Since such a showing is a precondition to the securing of a preliminary injunction, New Comm Wireless Servs., 287 F.3d at 9, we need not probe the other components of the applicable four-part test. It suffices to say that the district court acted well within the encincture of its discretion in denying W & S's request for preliminary injunctive relief.

Affirmed.

APPENDIX E

[Great Seal of Rhode Island]

STATE OF RODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Business Regulation

DIVISION OF COMMERCIAL LICENSING AND REGULATION
233 Richmond Street, Suite 230
Providence, RI 02903-4230
Tel. (401) 222-2416 or (401) 222-2417
TDD: (401) 222-2999 FAX: (401) 222-6654
Web Site: www.dbr.state.ri.us

September 21, 2005

TO ALL CLASS A LICENSEES & WHOLESALERS:

Enclosed please find an important Department Bulletin highlighting certain types of prohibited practices under Rhode Island General Laws §§3-5-11 and 11.1. Please govern your businesses accordingly. The Department reserves the right to take enforcement action against any licensee who does not conform its activities within the parameters of the law.

If you have any questions regarding the enclosed Bulletin, please feel free to contact me at the telephone number posted above or Executive Counsel Richard Berstein at 222-8241.

Sincerely,
/s/
Jeffery J. Greer
Associate Director

cc: A. Michael Marques, Director
Richard Berstein, Executive Counsel
Rebecca Partington, Department of Attorney General

BULLETIN

#2005-2

This Bulletin serves to address four (4) key questions relating to the types of practices prohibited by the recent amendments to R.I.G.L. §§3-5-11 and 11.1. These statutory changes eliminate any chain store and alcoholic beverage franchisor/franchisee relationships. This Bulletin is not meant to be an exhaustive list of prohibited practices as set forth in the law, but rather will serve to provide an overview of certain prohibited practices for which enforcement action will be taken. Accordingly, pursuant to the prohibitions set forth in R.I.G.L. §§3-5-11 and 11.1, the following practices are hereby prohibited:

1. common, group, joint or coordinated purchases of wholesale merchandise by more than one (1) licensee or volume discounts granted by wholesalers from orders generated by more than one (1) retail licensee;

2. participation in coordinated or common advertising with one or more licensed Class A alcoholic beverage licensees. Two (2) licensees should not be mentioned in any manner in any advertisement, nor should there be references to the ability to purchase items at more than one (1) store;

3. the placing of orders of product with wholesalers by individuals not a manager, officer or owner of the licensed premises. A Class A licensee cannot have a third party with no managerial or ownership status control the flow of products, promotions and marketing activity for a given store;

4. existence of Class A licensees with the same or materially similar names. By April 1, 2006, each retail licensee will be required to operate under a name totally dissimilar from other Class A licensees with the exception that a full proper legal name may be used as a business

name. For example, if there is more than one licensee operating under the name "Smith's Liquors" the name should be changed to a totally dissimilar name or, if the owner is named Smith, the name may be changed to the full legal name of the owner such as "Joe Smith's Liquors," to demonstrate apprppriate differentiation. Accordingly, two (2) or more stores currently named in a manner such as "Hank's Liquors of Smithfield" and "Hank's Liquors of Newport" will not be considered a sufficient differentiation of name. Under separate cover, the Department will soon be notifying all Class A licensees with same or similar names to submit proposed name changes to the Department to secure prior approval of proposed name changes by December 31, 2005, which approval shall not be unreasonably withheld.

The Department encourages all licensees to call with any further questions they may have about operating under R.I.G.L. §§3-5-11 and 11.1. The Department also encourages all licensees to report any violations of R.I.G.L. 3-5-11 and 11.1.

APPENDIX F

[Great Seal of Rhode Island]

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Department of Business Regulation
DIVISION OF COMMERCIAL LICENSING AND RACING AND ATHLETICS
233 Richmond Street, Suite 230
Providence, RI 02903-4230

December 15, 2005

TO CLASS A LICENSEES WITH SAME OR SIMILAR NAMES:

Attached please find an amendment to paragraph #4 of the Department's Bulletin #2005-2 which serves to clarify the provisions of paragraph #4. Please feel free to call the Department with any questions you may have.

Please note the deadline for submitting a name change remains December 31, 2005. Failure to submit to the deadline requirements could result in disciplinary action by the Department.

Sincerely,

Jeffrey J. Greer
Associate Director

jjg/dm

4. existence of Class A licensees with the same or materially similar names. By April 1, 2006, each retail licensee will be required to operate under a name totally dissimilar from other Class A licensees. In the event that there are two or more Class A licensees who wish to retain the same or materially similar names, the Department will consider such factors as when the license was issued and the original name of the licensee.

Without limiting the authority of the Department in its discretion to determine that a name is not distinguishable from another Class A licensee, a name shall not be deemed "distinguishable" from another existing name if the only difference between the names results from any one or more of the following:

- An article (a, an, the)
- Plural forms of the same word
- Phonetic spelling of the same name or word (for example, Cat Liquors versus Kat Liquors, or Boyz Package Store versus Boys Liquor Store)
- An abbreviation in place of a complete spelling of the name (for example, Northeast Liquors, Inc. versus NE Liquors, Inc)
- A suffix or prefix added to a word or any other deviation from or derivative of the same word (for example, Liquor Specialists, Inc. versus Liquored Specialists, Inc. or Possible Liquor Store, Inc. versus Impossible Liquor Store, Inc.)
- A change in a word or name indicating entity status (for Example, Alcohol Enterprises, Inc. versus Alcohol Enterprises Corporation)
- The addition of a geographic location or place, or a numeric designation (for example, Gourmet Liquors, Inc. versus Gourmet Liquors of Providence, Inc. or Gourmet Liquors I, Inc. versus Gourmet Liquors II, Inc.)

- Differences in punctuation or special characters
- Differences in capitalization
- Differences in whether letters or numbers immediately follow each other or are separated by one or more spaces
- An Arabic numeral representing a number, a roman numeral representing the same number and/or a word representing the same number appearing in the same position within otherwise identical names (for example, 2 Brothers Packie, Inc. versus II Brothers Packie, Inc. versus Two Brothers Packie, Inc.)

Under separate cover, the Department will soon be notifying all Class A licensees with same or similar names to submit proposed name changes to the Department to secure prior approval of proposed name changes by December 31, 2005, which approval shall not be unreasonably withheld.

The Commerce Clause of the Constitution of the United States reads, "The Congress shall have the power . . . To regulate commerce . . . among the several states." U.S. CONST., Article 1, §8.

The First Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment reads in relevant part, "[States] shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

RHODE ISLAND GENERAL LAWS

TITLE 3 ALCOHOLIC BEVERAGES

CHAPTER 3-1 GENERAL PROVISIONS

§ 3-1-1 Definitions. – As used in this title, unless the context otherwise requires:

(1) "Beverage" means any liquid which either by itself or by mixture with any other liquid or liquids is or may become fit for human consumption as a drink and which contains five-tenths of one per cent (.5%) or more of alcohol by weight.

(2) "Club" means a corporation subject to the provisions of chapter 6 of title 7, owning, hiring, or leasing a building or space in a building of such extent and character as may be suitable and adequate for the reasonable and comfortable accommodation of its members, and whose affairs and management are conducted by a board of directors, executive committee or other similar body chosen by the members at a meeting held for that purpose, none of whose members, officers, agents, or employees are paid directly or indirectly any compensation by way of profit from the distribution or sale of beverages to the members of the club or to its guests beyond the amount of any reasonable salary or

wages as may be fixed and voted each year by the directors or other governing body.

(3) "Department" means the department of business regulation.

(4) "Director" means the director of the department of business regulation.

(5) "Division of taxation" means the division of taxation of the department of administration.

(6) "Farmer-winery" means any plant or premise where wine is produced, rectified, blended or fortified from fruits, flowers, herbs or vegetables.

(7) "Import" means at one time or in one transaction to take or cause to be taken into this state from outside the state any malt beverage in excess of eight (8) gallons or any vinous beverage or any beverage consisting in whole or in part of alcohol produced by distillation in excess of three (3) gallons.

(8) "Intoxicating beverage" means a beverage which contains more than three and two-tenths percent (3.2%) of alcohol by weight.

(9) "Malt beverage" means any beverage which is usually produced at breweries, as distinguished from distilleries.

(10) "Nonintoxicating beverage" means a beverage which contains not more than three and two-tenths percent (3.2%) of alcohol by weight.

(11) "Tavern" means any house where the principal business is the furnishing of food and sleeping accommodations.

(12) "Victualing house" means any shop or place where a substantial part of the business is the furnishing of food for consumption at the place where it is furnished.

(13) "Winegrower" means any person licensed to operate a farmer's winery under § 3-6-1.1.

(14) "Wines" means all fermented alcoholic beverages made from fruits, flowers, herbs, or vegetables and containing not more than twenty-four percent (24%) of alcohol by volume at sixty degrees Fahrenheit (60 degrees F), except cider obtained by the alcohol fermentation of the juice of apples and containing not less than five tenths of one percent (.05%) or containing not more than six percent (6%), of alcohol by weight at sixty degrees Fahrenheit (60 degrees F) including but not limited to flavored, sparkling, or carbonated cider.

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§ 3-1-5 Liberal construction of title. – This title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages.

CHAPTER 3-5 Licenses Generally

§ 3-5-1 License required for manufacture, sale, or importation of beverages. – No person shall at any time manufacture or sell or suffer to be manufactured or sold or keep or suffer to be kept on his or her premises or possession or under his or her charge for the purpose of sale within this state any beverage unless licensed to do so as provided in this title; and except as provided in this title no person shall import, or suffer to be imported beverages into this state.

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§ 3-5-10 Residence of licensees and qualifications of persons and corporations as licensee. – (a)(1) Except as otherwise provided, licenses are issued only to citizens who are residents of this state. It is not required that dining car companies, sleeping car companies, railroad companies operating in this state, or companies operating

passenger-carrying marine vessels in this state be citizens of this state in order to be eligible to receive retailers' Class G licenses. Retailer's licenses may, however, be issued to corporations incorporated in any other of the United States which are authorized by the secretary of state to transact business in this state.

(2) Notwithstanding the provisions of subsection (a)(1) of this section, no license shall be issued, granted, renewed, or transferred to any trust or trustee or to any corporation of which any share or shares of stock or other indicia of ownership or control are owned or held by any trust, or trustee, business organization, or other entity or person other than a natural person or corporation authorized by the secretary of state to transact business in this state; provided, however, that this subsection shall not affect any grant, renewal, or transfer of a license which occured prior to the effective date of this subsection [June 15, 2000].

(b)(1) In applications for beverage licenses by corporations except those having more than twenty-five (25) stockholders, the names and addresses of all officers and members of the board of directors and of all stockholders shall be filed with the board, body, or official to whom application is made. No beverage license shall be issued to the corporation unless each officer, director or stockholder is a suitable person to hold a license within the discretion of the board, body or official to whom application is made.

(2) All those corporations holding beverage licenses shall report to the board, body or official who issued the licenses the name of any newly elected officer or director and the acquisition by any person of more than ten percent (10%) of any class of corporate stock, within thirty (30) days after the election or acquisition. Thereupon, the board, body or official may call a hearing, at its discretion, to determine

whether the new officer, director or stockholder is a suitable person under this section and the board, body or official may revoke or suspend the license if the new officer or director or stockholder is not a suitable person to hold a license.

(3) No person shall acquire fifty percent (50%) or more of any class of the stock of any corporation licensed under this section, except corporations having more than twenty-five (25) stockholders, unless permission for the acquisition is first given by the board, body or official who issued the license. Application for permission to acquire stock is subject to the provisions of § 3-5-19 relating to the transfer of a license to another person except that it shall not be necessary that a new bond be given. Unless the board, body or official determines that the person seeking permission to acquire fifty per cent (50%) or more of the corporation's stock is a suitable person to hold a license, the permission shall not be given.

(4) The beverage license of a corporation is subject to suspension or revocation for failure to comply with any of the provisions of this section or for any fraud or misrepresentation in connection with the beverage license.

(c) Applicants for beverage licenses shall make full disclosure in their applications for a license of any interest, whether direct or indirect, by any other person, firm or corporation in the license applied for, and failure to do so or any misrepresentation by the applicant may be cause for denial of the application or revocation of the license if granted by the board, body or official issuing the license.

(d) The board, body or official issuing beverage licenses may also deny applications of persons who have criminal records, or who have records of repeated violations of this title.

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§ 3-5-11 Licensing of chain stores. – (a) Licenses, except retailer's Class E, Class B, Class B-H, Class B-L, Class B-M, and Class B-V licenses, authorized by this title shall not be granted, issued, or transferred to or for the use of any "chain store organization," which term shall consist of any chain of retail or wholesale business or business organizations, and more specifically defined herein, including, without limitation, grocery stores, markets, department stores, and convenience stores, as well as retailers of alcoholic beverages, and which include chains in which one or more stores are located outside of the state.

(b) The term "chain store organization" is defined to include, but not limited to:

(1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices:

(i) Common, group, centralized or coordinated purchases of wholesale merchandise.

(ii) Common billing or utilization of the services of the same person or the same entity in the management or operation of more than one liquor licensed business.

(iii) Participation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media.

(iv) Coordinated or common planning or implementation of marketing strategies.

(v) Participation in agreed upon or common pricing of products.

(vi) Any term or name identified as a chain or common entity.

(2) Any group of one or more liquor license holders who share any of the following common features, either directly or indirectly or acquire any direct or indirect beneficial interest in the following practices:

(i) The same director of a corporation, member of a LLC, LLP, partner in a general or limited partnership, trustee or beneficiary of a trust.

(ii) The same individual or corporate owners.

(3) Any group of one or more license holders that is found to be a "chain store organization" as a factual matter by the department, as a result of an evidentiary hearing in connection with any application for the issuance, grant or transfer of a license, or upon the filing of a complaint by any member of the public.

(4) Upon a finding of violation of this section, the department shall be empowered to set a fine up to the amount of ten thousand dollars ($10,000) per violating licensee, revoke the license of the violator, or suspend the license of the violator for a period of time to be determined by the department. Additionally, the department shall issue a cease and desist order against the violating chain store entity(s) and may further order the dissolution of the violating chain store entity(s).

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§ 3-5-11.1 Liquor franchises prohibited. – (a) To promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing. Class A liquor license authorized by this title shall not be granted, issued, renewed or transferred to or for the use of any liquor franchisor or franchisee. Class A liquor license holders are expressly prohibited from utilizing the provisions of the Franchise Investor Act, § 19-28-1 et seq.

(b) Any franchise agreements involving the retail sales of alcoholic beverages are hereby declared null and void and illegal as of the effective date of this section [April 1, 2005].

(c) Any franchise agreements involving the retail sales of alcoholic beverages shall be terminated by the franchisor or the franchisee within thirty (30) days of the effective date of this section.

(d) Upon finding of a violation of this section by either the franchisor or the licensee, the department shall be empowered to set a fine up to the amount of ten thousand dollars ($10,000) per violating franchisor or licensee, revoke the license of the violator or suspend the license of the violator for a period of time to be determined by the department. Additionally, the department shall have the power to revoke or suspend the franchise registration in accordance with § 19-28.1-18 and to order it to cease and desist from all operations that are violative of the provisions of this section.

Notwithstanding anything contained in this chapter to the contrary, this act shall not be construed as to prevent the utilization of duly licensed professionals rendering services as independent contractors.

Coronado Municipal Code

Title 86: Zoning

Chapter 86.55: Special Use Permits

86.55.370 Formula business.

A. Purpose. The purpose of the standards in this section is to regulate the location and operation of formula business establishments in order to maintain the City's unique village character, the diversity and vitality of the community's commercial districts, and the quality of life of Coronado residents. It is presumed that establishing or preserving an appropriate and balanced mix of local, regional, and national-based businesses and small, medium or large-sized businesses will more effectively serve to achieve this purpose as a strategy to maintain the economic health of the community's business districts and the small-scale eclectic ambiance.

B. Regulations.

1. A formula business establishment may be allowed in the Hotel-Motel Zone with a major special use permit;
2. The cumulative expansion of a formula business establishment by 500 or more square feet of floor area shall require a minor special use permit amendment or a minor SUP if the establishment does not already have a major special use permit;
3. A formula business establishment (except for grocery stores, banks, savings and loans, full service restaurants and theaters) shall not have a street level frontage of greater than 50 linear feet on any street or have its retail space occupy more than two stories;
4. A formula business establishment shall fully comply with all applicable regulations of this code including environmental design review; and

5. Change of ownership of an existing formula business establishment shall not, by itself, require obtaining a major special use permit or major SUP amendment as applicable.

C. Required Findings for Approval.

1. The formula business establishment will be compatible with existing surrounding uses, and has been designed and will be operated in a nonobtrusive manner to preserve the community's character and ambiance;

2. Approval of the formula business establishment will be consistent with the policies and standards of the General Plan and the local coastal program, and that the proposed intensity of uses on the sites is appropriate given the uses permitted on the site and on adjoining sites by these documents;

3. Approval of the formula business establishment will contribute to an appropriate balance of local, regional or national-based businesses in the community; and

4. Approval of the formula business establishment will contribute to an appropriate balance of small, medium and large-sized businesses in the community.

Code of the Town of Nantucket, Massachusetts
Chapter 139: Zoning
ARTICLE I: Purpose; Definitions

§139-2. Formula Retail Uses.

* * *

Formula Business –A type of retail sales establishment, restaurant, tavern, bar, or take-out food establishment which is under common ownership or control or is a franchise, and is one of 14 or more other businesses or establishments worldwide maintaining three or more of the following features:

(1) Standardized menu or standardized array of merchandise with 50% or more of in-stock merchandise from a single distributor bearing uniform markings.

(2) Trademark or service mark, defined as a word, phrase, symbol or design, or a combination or [sic] words, phrases, symbols of [sic] designs that identifies and distinguishes the source of goods from one party from those of others, on products or as part of the store design.

(3) Standardized color scheme used throughout the interior or exterior of the establishment.

(4) Standardized uniform including but not limited to aprons, pants, shirts, smocks or dresses, hat, and pins (other than name tags).

* * *

ARTICLE III: Use and Intensity Regulations

* * *

§139-9. Residential Commercial Districts RC, RC-2 and RCDT.

A. Permitted uses:

(1) Retail sales, including on-premises light manufacturing or fabrication clearly ancillary to the retail sales; except for formula business within the FBED.

(2) Offices, both public and private, including banking, brokers and other financial services.

(3) Transient residential facilities, except that transient residential facilities shall only be permitted in the RC District and not RC-2.

(4) Restaurants, except for formula business within the FBED.

* * *

§139-10. Limited Commercial District LC.

A. Permitted uses:

(1) Rooming, lodging and guest houses.

(2) Nonprofit clubs.

(3) Recreational facilities.

B. Exceptions. The Board of Appeals may grant a special permit to allow the following uses:

(1) Nonprofit cultural and artistic facilities.

(2) Retail sales and personal services, except for formula business within the FBED.

(3) Business, professional, financial and public offices.

(4) Restaurants, hotels, motels and inns, except for formula business within the FBED.

(5) Marinas and other maritime-related recreation and commercial facilities, including maritime

service stations for the retail sale of fuel, lubricants and accessories, and minor services incidental thereto.

* * *

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§139-12. Overlay Districts Flood Hazard FHD, Public Well Recharge PWR, Multifamily (MF), Neighborhood Employee Housing (NEHOD), Dormitory Overlay District (DOD), Country Overlay District (COD) and Town Overlay District (TOD).

* * *

H. Formula Business Exclusion District (FBED).

(1) The Formula Business Exclusion District (FBED) is located and bounded as shown on the map entitled "Article 42: Proposed Formula Business Exclusion District" prepared by the GIS Department, dated March 2006.

(2) Statement of purpose. The purpose and intent of the Formula Business Exclusion District (FBED) is to address the adverse impact of nationwide, standardized businesses on Nantucket's historic downtown area. The proliferation of formula businesses will have a negative impact on the island's economy, historical relevance, and unique character and economic vitality. These uses are therefore prohibited in order to maintain a unique retail and dining experience. Formula businesses frustrate this goal by detracting from the overall historic island experience and threatening its tourist economy.

San Francisco Municipal Code

Planning Code

Article 7: Neighborhood Commercial Districts

§703.3. Formula Retail Uses.

(a) Findings.

(1) San Francisco is a city of diverse and distinct neighborhoods identified in large part by the character of their commercial areas.

(2) San Francisco needs to protect its vibrant small business sector and create a supportive environment for new small business innovations. One of the eight Priority Policies of the City's General Plan resolves that "existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced."

(3) Retail uses are the land uses most critical to the success of the City's commercial districts.

(4) Formula retail businesses are increasing in number in San Francisco, as they are in cities and towns across the country.

(5) Money earned by independent businesses is more likely to circulate within the local neighborhood and City economy than the money earned by Formula retail businesses which often have corporate offices and vendors located outside of San Francisco.

(6) Formula retail businesses can have a competitive advantage over independent operators because they are typically better capitalized and can absorb larger startup costs, pay more for lease space, and commit to longer lease contracts. This can put pressure on existing businesses and

potentially price out new startup independent businesses.

(7) San Francisco is one of a very few major urban centers in the State in which housing, shops, work places, schools, parks and civic facilities intimately co-exist to create strong identifiable neighborhoods. The neighborhood streets invite walking and bicycling and the City's mix of architecture contributes to a strong sense of neighborhood community within the larger City community.

(8) Notwithstanding the marketability of a retailer's goods or services or the visual attractiveness of the storefront, the standardized architecture, color schemes, decor and signage of many formula retail businesses can detract from the distinctive character of certain Neighborhood Commercial Districts.

(9) The increase of formula retail businesses in the City's neighborhood commercial areas, if not monitored and regulated, will hamper the City's goal of a diverse retail base with distinct neighborhood retailing personalities comprised of a mix of businesses. Specifically, the unregulated and unmonitored establishment of additional formula retail uses may unduly limit or eliminate business establishment opportunities for smaller or medium-sized businesses, many of which tend to be non-traditional or unique, and unduly skew the mix of businesses towards national retailers in lieu of local or regional retailers, thereby decreasing the diversity of merchandise available to residents and visitors and the diversity of purveyors of merchandise.

(10) If, in the future, neighborhoods determine that the needs of their Neighborhood Commercial Districts are better served by eliminating the

notice requirements for proposed formula retail uses, by converting formula retail uses into conditional uses in their district, or by prohibiting formula retail uses in their district, they can propose legislation to do so.

(b) Formula Retail Use. Formula retail use is hereby defined as a type of retail sales activity or retail sales establishment which, along with eleven or more other retail sales establishments located in the United States, maintains two or more of the following features: a standardized array of merchandise, a standardized facade, a standardized decor and color scheme, a uniform apparel, standardized signage, a trademark or a servicemark.

(1) Standardized array of merchandise shall be defined as 50% or more of in-stock merchandise from a single distributor bearing uniform markings.

(2) Trademark shall be defined as a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of the goods from one party from those of others.

(3) Servicemark shall be defined as word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of a service from one party from those of others.

(4) Decor shall be defined as the style of interior finishings, which may include but is not limited to, style of furniture, wallcoverings or permanent fixtures.

(5) Color Scheme shall be defined as selection of colors used throughout, such as on the furnishings, permanent fixtures, and wallcoverings, or as used on the facade.

(6) Facade shall be defined as the face or front of a building, including awnings, looking onto a street or an open space.

(7) Uniform Apparel shall be defined as standardized items of clothing including but not limited to standardized aprons, pants, shirts, smocks or dresses, hat, and pins (other than name tags) as well as standardized colors of clothing.

(8) Signage shall be defined as business sign pursuant to Section 602.3 of the Planning Code.

(c) "Retail sales activity or retail sales establishment" shall include the following uses, as defined in Article 7 of this Code: "bar," "drive-up facility," "eating and drinking use," "liquor store," "restaurant, large fast-food," "restaurant, small self-service," "restaurant, full-service," "sales and service, other retail," "sales and service, retail," "movie theatre," "video store," "amusement and game arcade," and "take-out food."

(d) Formula Retail Uses Permitted. Any use permitted in a Neighborhood Commercial District, which is all a " formula retail use" as defined in this Section, is hereby permitted.

(e) Formula Retail Use Prohibited. Notwithstanding subsection (d), any use permitted in the Hayes-Gough Neighborhood Commercial District, or the North Beach Neighborhood Commercial District, which is also a " formula retail use" as defined in this Section, is hereby prohibited.

(f) Conditional Uses. Notwithstanding subsections (d) or (e), any use permitted in the Haight Street Neighborhood Commercial District, the Japantown Special Use District as defined in Section 249.31, or in the Small-Scale Neighborhood Commercial District along Divisadero Street, bounded by Haight Street to the south and Turk Street to the north . . . and at Parnassus and Stanyan Streets (Block 1276, Lot 21),

which is also a " formula retail use" as defined in this Section, is hereby permitted only as a conditional use. Additional criteria to be used by the Planning Commission when considering granting conditional use permits to formula retail uses in these districts are listed in Section 303(i).

(g) Neighborhood Commercial Notification and Design Review. After the effective date of this Ordinance, any building permit application for a use permitted in a Neighborhood Commercial District which is also a " formula retail use" as defined in this section shall be subject to the Neighborhood Commercial Notification and Design Review Procedures of Section 312 of this Code.

(h) Discretionary Review Guidelines. The Planning Commission shall develop and adopt guidelines which it shall employ when considering any request for discretionary review made pursuant to this Section. These guidelines shall include but are not limited to consideration of the following factors:

(1) Existing concentrations of formula retail uses within the Neighborhood Commercial District.

(2) Availability of other similar retail uses within the Neighborhood Commercial District.

(3) Compatibility of the proposed formula retail use with the existing architectural and aesthetic character of the Neighborhood Commercial District.

(4) Existing retail vacancy rates within the Neighborhood Commercial District.

(5) Existing mix of Citywide-serving retail uses and neighborhood-serving retail uses within the Neighborhood Commercial District.

(i) Determination of Formula Retail Use. After the effective date of this Ordinance, in those areas in which " formula retail uses" are

prohibited, any building permit application determined by the City to be for a " formula retail use" that does not identify the use as a " formula retail use" is incomplete and cannot be processed until the omission is corrected. Any building permit approved after the effective date of this Ordinance that is determined by the City to have been, at the time of application, for a " formula retail use" that did not identify the use as a " formula retail use" is subject to revocation at any time.

After the effective date of this Ordinance, in those areas in which " formula retail uses" are subject to the Neighborhood Commercial Notification and Design Review provisions of subsection (e), any building permit application determined by the City to be for a " formula retail use" that does not identify the use as a " formula retail use" is incomplete and cannot be processed until the omission is corrected. After the effective date of this Ordinance, any building permit approved that is determined by the City to be for a " formula retail use" that does not identify the use as a " formula retail use" must complete the Neighborhood Commercial Notification and Design Review required in subsection (e).

If the City determines that a building permit application or building permit subject to this Section of the Code is for a " formula retail use," the building permit applicant or holder bears the burden of proving to the City that the proposed or existing use is not a " formula retail use."

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§703.4. Conditional Use Authorization For Formula Retail Uses.

(a) This Ordinance shall be known as the Small Business Protection Act.

(b) Notwithstanding Section 703.3(d) and except for Section 703.3(e), establishment of a formula retail use, as defined in Section 703.3, in any Neighborhood Commercial District, as identified in Article 7, shall require conditional use authorization pursuant to the criteria of Sections 303(c) and 303(i) and be subject to the terms of Sections 703.3(g) and (i).

(c) Nothing herein shall preclude the Board of Supervisors from adopting more restrictive provisions for conditional use authorization of formula retail use or prohibiting formula retail use in any Neighborhood Commercial District.

(Added by Proposition G, § 2, 11/7/2006)

Sausalito Municipal Code
Title 10: Zoning
Chapter 44: Specific Use Requirements

§10.44.240 Formula Retail

A. Purpose. The purpose of the standards in this Section regulate the location and operation of formula retail establishments in order to maintain the City's unique village character, the diversity and economic vitality of the community's commercial districts, and the quality of life of Sausalito residents. The City has determined that preserving unique architecture, signage, graphic and other design elements so that the City maintains a distinctive visual appearance and small-scale eclectic ambiance will promote the long-term viability of the community's businesses districts. The City has also determined that preserving a balanced mix of local, regional, and national-based businesses and small and medium sized businesses will maintain and promote the long-term economic health of visitor-serving businesses and the community as a whole. It is therefore the intention of the City that an over-concentration of formula retail businesses not be allowed, that all permitted formula retail establishments shall create a unique visual appearance that reflect and/or complement the distinctive and unique historical character of Sausalito, and that no such establishment shall project a visual appearance that is homogenous with its establishments in other communities.

B. Applicability, "Formula Retail" means a type of retail sales activity or retail sales establishment, including food service, which is required to maintain any of the following: standardized ("formula") array of services and/or merchandise, trademark, logo, service mark, symbol, sign, decor, architecture, layout, uniform, or similar standardized feature.

C. Conditional Use Permit Required. A Conditional Use Permit shall be required for any Formula Retail establishment in the City.

1. A Formula Retail Establishment may be allowed only in the Central Commercial, Shopping Center and Neighborhood Commercial District and only with a Conditional Use Permit;
2. The expansion of any existing Formula Retail establishment shall require a Conditional Use Permit if the establishment does not already have a Conditional Use Permit.
3. The cumulative expansion of a permitted Formula Retail establishment by 500 or more square feet of floor area shall require a Conditional Use Permit amendment; and
4. A Formula Retail establishment shall fully comply with all applicable regulations of this Code including Design Review.

D. Required Findings for Approval. In addition to all of the findings required by Section 10.60.070, all of the following findings must be made prior to the issuance of a Conditional Use Permit for a Formula Retail establishment:

1. The Formula Retail establishment will be compatible with existing surrounding uses, and has been designed and will be operated in a non-obtrusive manner to preserve the community's distinctive character and ambiance;
2. The Formula Retail establishment will not result in an over-concentration of formula retail establishments in its immediate vicinity or the City as a whole;
3. The Formula Retail establishment will promote diversity and variety to assure a balanced mix of commercial uses available to serve both resident and visitor populations;

4. The Formula Retail establishment will contribute to an appropriate balance of local, regional or national-based businesses in the community;
5. The Formula Retail establishment will be mutually beneficial to and would enhance the economic health of surrounding uses in the district;
6. The Formula Retail establishment will contribute to an appropriate balance of small, medium and large-sized businesses in the community, and
7. The proposed use, together with its design and improvement, is consistent with the unique historic character of Sausalito, and would preserve the distinctive visual appearance and shopping experience of Sausalito for its residents and visitors.

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(2)

No. 07-74

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS – N. PROVIDENCE, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, and UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

This Court has held that the three tier liquor distribution system (producers, wholesalers, and retailers) existing by law in many states is "unquestionably legitimate." As relevant here, Rhode Island regulates that system by, *inter alia*, prohibiting any liquor retailer from forming a chain store or franchise with other retailers. Rhode Island's one-store limit applies neutrally and evenhandedly in purpose and effect to both in-state and out-of-state entities. To enforce its ban, among other things, the State prevents price fixing in the form of common or coordinated advertising and use of the same name – both actions the result of the prohibited collusive action in the marketplace. The First Circuit's holdings twice sustaining the ban were limited to the retail alcoholic beverage industry and upheld the ban under both the Twenty-first Amendment and the State's traditional police power.

Accordingly, the questions presented are:

1. Whether a State may structure its retail liquor distribution system to outlaw chain stores and franchises?

2. Whether a State's retail liquor chain store and franchise prohibition – which treats in-state and out-of-state license holders evenhandedly in purpose and effect – implicates the Commerce Clause?

3. Whether a State may prohibit price fixing schemes by liquor retailers by banning advertisement of the results of such collusion – called "joint advertising" and "shared use of trade name" by Petitioners?

COUNTERSTATEMENT OF THE QUESTION PRESENTED – Continued

4. Whether Petitioners' belated arguments concerning Rhode Island's residency requirement are not worthy of certiorari because, as the First Circuit affirmed, Petitioners have no standing to raise them?

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OPINIONS BELOW

In addition to the opinions noted by the Petitioners, there have been two reported decisions denying preliminary injunctive relief issued during the course of this litigation: *Wine and Spirits Retailers, Inc. v. State of Rhode Island,* 364 F. Supp. 2d 172 (D.R.I. 2005), *aff'd, Wine and Spirits Retailers, Inc. v. State of Rhode Island,* 418 F.3d 36 (1st Cir. 2005). The Court may also note the decisions rendered in the administrative proceedings ongoing in the State courts, provided in an Appendix ("App.") attached hereto.

STATEMENT OF THE CASE

Petitioners challenge Rhode Island's seventy-four year old law forbidding chain stores from holding Class A licenses, which allow the retail sale of alcoholic beverages to the public. This case began with a scattergun approach.[1] Petitioners initially alleged that the prohibition against Class "A" licenses being held by chain or franchise stores violated the First Amendment's guarantee of free speech, assembly, and something called "unfettered discretion." In what then seemed to be an afterthought, Petitioners also claimed that the law violated the Commerce Clause, the Fifth Amendment, the Fourteenth Amendment and 42 U.S.C. § 1983.

At this level, Petitioners focus on the Commerce Clause and its applicability to the present dispute. Specifically, Petitioners now claim that the requirement that the holders of a Class A license be Rhode Island residents violates the Commerce Clause, and that the restriction that only a single license may be held by any one person or corporation, wherever

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[1] In its decision granting judgment in the State's favor, the trial court observed that "The plaintiffs have brought a seven-count Complaint that the Rhode Island statute prohibiting chain store organizations and franchise operations from engaging in retail sale of alcoholic beverages violates nearly every provision of the Constitution except the guarantee of the right to bear arms and the prohibition against cruel and unusual punishment." (Petitioners' Appendix 28, hereinafter referred to as "Pet. App.").

situated, impermissibly regulates extraterritorially. They also continue to argue that the State's disinclination to allow joint advertising, consisting of identical ads offering the same products for the same prices, and the use of identical trade names, banners, logos, and much more, violates their First Amendment rights.

Rhode Island General Laws § 3-5-11.1, as amended, provides that Class A licenses[2] shall not be granted, issued or transferred to any chain store organization. That law lists certain activities that may result in a finding that an organization is a chain, and cannot hold a Class A license. Petitioners mischaracterize the above list as establishing absolute prohibitions against the cited activity. A simple reading of the statute makes clear that is not correct – subsections (1)(a)-(f) simply provide indicia of chain store ownership that the State may consider when determining whether stores have violated the law. Petitioners also doggedly mischaracterize the purpose of Rhode Island's legislative scheme regulating alcoholic beverages. The actual purpose is clearly stated in Title 3 of the Rhode Island General Laws. The overarching purpose of the entire liquor regulatory scheme is " . . . the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. The specific purpose of the Amendment, as articulated by Rhode Island's General Assembly, is "to promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11.1(a).

Section 3-5-10 of the Rhode Island General Laws requires that, in order to hold a retail liquor license in Rhode Island, one must be a Rhode Island resident or corporation. Finally, section 3-5-11 makes it clear that liquor stores inside and outside of the state are counted for purposes of determining whether the one store licensing limit applies.

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[2] Class A licenses are issued to retail package liquor stores. R.I. Gen. Laws §§ 3-7-1, 3-7-3.

Initially, Wine and Spirits Retailers, Inc. (as franchisor, hereinafter "W&SR") and John Haronian (as principal of W&SR, and who directs the business activities of the stores), sought a preliminary injunction against enforcement of the statute, which was denied. *Wine and Spirits Retailers, Inc. v. State of Rhode Island*, 364 F. Supp. 2d 172 (D.R.I. 2005). Receiving evidence that the joint advertisements were placed after representatives from the stores met monthly to determine what products they would sell at what agreed-upon prices, the District Court in a strongly worded decision found that the law did not "in any way" prevent W&SR from providing paid marketing and management advice, as claimed in the Complaint and moving papers. The Court explained

> What [the prohibition on joint advertising] prohibits is concerted activity on the part of Class A licensees to engage in such practices. W&SR does not hold a Class A license and remains free to provide licensees with planning and/or marketing advice which, during the hearing, it described as advice regarding marketing, methods of doing business, what products to sell, and how to set up a store.

364 F. Supp. 2d at 176. The Court refused to approve the blatant price-fixing agreements that formed the foundation for the joint advertisements.

The Court found that W&SR was "free to provide marketing and management advice and even advice regarding coordinated planning and implementation of marketing strategies." *Id.* at 177. The prohibition, as described by the Court, was to prevent "Class A licensees from acting in concert to engage in such activities." *Id.* The Court found that the First Amendment did not have any application to the activity engaged in by W&SR, holding that the ban only applied to common advertising by Class A license holders. The District Court held that the prohibition affected only "the *concerted activity* of placing *common* advertisements which the evidence shows requires agreement among licensees with respect to what products will be advertised and what price will be charged for those products." *Id.* (emphasis in original). The trial court determined that the activity at

play here was not speech, but conduct consisting of "anti-competitive commercial practices." *Id.*

The denials of the Preliminary Injunction requests were appealed, resulting in a decision affirming the District Court. *Wine and Spirits Retailers, Inc. v. State of Rhode Island*, 418 F.3d 36 (1st Cir. 2005). The First Circuit correctly characterized the legislation as "tantamount to an antitrust law," the constitutionality of which "is not open to debate." *Id.* at 51. Judge Selya captured the State's argument in a nutshell: "While the State cannot regulate the right of speakers to band together to convey a common message in the marketplace of ideas, it most assuredly can exercise control over the efforts of market players to exploit the principle of strength in numbers in the marketplace of goods." The fact that the relationship involved included components of communication was held not to warrant "overriding the State's historic right to regulate market forces in the retail liquor industry." 418 F.3d at 53. The Court found no First Amendment or Equal Protection violations based upon the activities of W&SR or Haronian – even though they tried to assert the rights of the franchisee stores.

The Complaint was subsequently amended to add three store plaintiffs.[3] The new plaintiffs moved for a preliminary injunction, which was denied. No appeal followed. After a bench trial, the District Court issued a decision unequivocally rejecting all constitutional arguments pressed by the Petitioners. *Wine and Spirit Retailers, Inc. v. State of Rhode Island*, No. 04-418T (July 19, 2006) (Pet. App. 27). The facts elicited at trial did not support any of the serious constitutional accusations that were flung at the State. The trial judge characterized the evidence offered by the Petitioners as "patently incredible." (Pet. App. 38). Conversely, the State proved that an impermissible, anti-consumer chain store existed, and that it was conduct, not speech or interstate commerce that was targeted by the statutes. The facts

[3] All franchisee stores associated with W&SR are named "Douglas Wine & Spirits" or "Peoples' Liquor Warehouse." W&SR does not do business outside of that family.

established at trial showed that at the time the law was passed, W&SR had franchise agreements with stores in Rhode Island and Massachusetts, dictating everything from location to permitted suppliers to color schemes and layout of the floor plans. The stores clearly did not control their day-to-day business. Other facts elicited at trial established that John Haronian is President and sole owner of W&SR. W&SR does not provide any services for any stores other than Douglas Wine and Spirits or Peoples' Liquor Warehouse stores. (C.A. App. 73, 262).[4] W&SR is a Rhode Island corporation. W&SR does not intend to attempt to obtain a Class A license for itself. John Haronian does not want to own a liquor store in Rhode Island. (C.A. App. 74).

The relationship of the stores and the individuals, if diagramed like a tree, would not have many branches. As stated above, John Haronian is the sole corporate office holder in both W&SR and Tri-State, a management company that oversees the day-to-day operations of the stores. (C.A. App. 73).[5] The Rhode Island stores are all owned by friends or family of John Haronian.[6]

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[4] The Appendix provided to the First Circuit is designated as "C.A. App.".

[5] Additionally, Haronian has what he termed "an interest" in three Massachusetts liquor stores – a Douglas Wine and Spirits in Fairhaven, a Douglas Wine and Spirits in New Bedford, and a Peoples' Liquor Warehouse in Fall River, owned by a corporation of which he is the sole shareholder. (C.A. App. 79). His daughter, Shirley Santoro, owns one of the W&SR's Massachusetts potential franchisees, Douglas Wine and Spirits *dba* Tanza Liquors. (C.A. App. 75). The Massachusetts Alcoholic Beverage Control Commission has rejected the application for a franchise relationship because of the excessively intertwined nature of the individuals and the businesses. http://www.mass.gov/Abcc/administration/decisions/10052005_tanzaliquors.htm. A case almost identical to the one *sub judice* was brought before the United States District Court for the District of Massachusetts, *Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200 (D.Mass. 2006). That case was recently dismissed. *See* discussion, *infra*.

[6] The Cranston store is owned by Ron Bochner, who bought it from Haronian's daughter, Lynn Finn. (C.A. App. 84). The Cumberland store is owned by Haronian's son-in-law Joseph Santoro. (C.A. App. 85). The

(Continued on following page)

The stores do not set their own prices on the 7,000-8,000 products that they sell. That is done at W&SR's offices in North Providence, at an address shared with Tri-State Management. (C.A. App. 102, 164). W&SR tells the stores what products are going on sale when, and instructs them on product placement within the store. (C.A. App. 93, 94, 113, 114, 119, 165). Identical posters are located in the windows of the stores. (C.A. App. 95).

Haronian offered insight into the business plan preferred by his organization, the franchise operation he wishes to resume. (C.A. App. 111). Prior to the 2004 amendment, the "franchisees" attended monthly meetings and agreed on what price a product would be sold for before the joint advertisements could be placed. (C.A. App. 91). They had to do that before the advertisement could go in the paper because they would all honor the price once it went into the newspaper. (C.A. App. 92). Petitioners have grudgingly changed the procedure somewhat, with each

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store in Johnston, Rhode Island, located on Route 44 is owned by Meredith Bochner, who is married to the owner of the Cranston store. (C.A. App. 85). DWS Johnston, a separate store from the Route 44 Johnston store, is owned by a trust, the beneficiary of which is Tyler Santoro, daughter of Joseph and Shirley. (C.A. App. 85). The North Providence store is owned by Kathleen Haronian, another daughter, who also serves as Vice-President of Tri-State. (C.A. App. 86). The store on Route 10 is owned by John's wife, Emily. (C.A. App. 86). Haronian's daughter Lynn Finn presently owns the Peoples' Liquor Warehouse in Hopkinton, and is also employed by Tri-State. (C.A. App. 87). The PLW in Apponaug is owned by a trust, the beneficiary of which is grandson Jonathan Santoro. (C.A. App. 87). The North Smithfield store is owned by a trust, the beneficiary of which is grandson Kyle Finn. (C.A. App. 87). The East Providence store is owned by a trust, the beneficiary is grandson Jared Santoro. (C.A. App. 87). (The trust arrangement appears to violate another subsection of 3-5-10, which prohibits ownership of a Class A license by a trust). A Pawtucket store is owned by Craig Power, who works for Haronian at W&SR as a Vice-President. (C.A. App. 87-88). Several of the stores are located in buildings owned by family members. Also, evidence indicated that stores shuffle employees. For example, Victor Correia, the only store representative offered at trial, has worked at five different DWS locations. (C.A. App. 157, 158).

store being presented with an advertisement that has been created by the W&SR marketing department, with product and price already in the draft copy of the advertisement. There is no participation in setting the prices on the products at the store level, however. (C.A. App. 164). Likewise, each store displays identical window signs containing the Douglas logo, sometimes directing the customer to "www.douglaswines.com." That address takes a customer to a website where orders are filled by the North Providence store, no matter where the customer saw the sign. (C.A. App. 97). Employees at all stores dress in an identical fashion, all wearing the "Douglas" logo, without any store designation. (C.A. App. 107). Stores also provide shopping carts emblazoned with the Douglas logo, with no differentiation as to the individual store. (C.A. App. 107).

Prior to the 2004 amendments, the stores would purchase products from wholesalers jointly. They would be offered discounts because of the quantity purchased. The discounts were determined by the joint purchase of the eleven franchisees, not by what each individual store purchased. (C.A. App. 101). That has changed since the amendment, with each store purchasing from the wholesalers on an individual basis. However, negotiations as to price on a product is still done by representatives from W&SR. W&SR instructs the stores as to what products they will carry. They do not use suggestive language, rather, the memos are clearly directives. One such memorandum instructs all of the stores that they "CANNOT" make their own decisions on a particular issue. W&SR wishes to return to the original way of doing business as they did prior to the amendments. (C.A. App. 111).

After the amendment, the State's Department of Business Regulation issued a bulletin specific to the issue of store names. (C.A. App. 103-105). Examples of what was permissible, and what was not, were contained in the bulletin. (C.A. App. 105-106). Despite the suggestion that license holders call with any questions, no representative from any of the Petitioners contacted the State regarding their similar names. Instead, they changed their name to

be *more* similar than prior to the issuance of the bulletin. (C.A. App. 105, 106). The State issued a more specific bulletin, specifying that a mere geographic delineation was not sufficient under the law. (C.A. App. 218-220). Petitioners ignored the bulletin. All other Rhode Island Class A license holders have complied with the amended law. (C.A. App. 216). State proceedings are ongoing in order to have the stores comply with the law. (App. 11, 43).

The District Court determined that the regulatory scheme was aimed at anticompetitive, collusive conduct and not speech, and had no extraterritorial reach. The Court further held that no Petitioner had standing to challenge the residency requirement, and that its validity did not impact on the chain store prohibition. The Court concluded that the statute did not violate any provision of the United States Constitution and was thus enforceable. The First Circuit affirmed, holding that, at every turn, Petitioners failed to shoulder their burden of proof.

SUMMARY OF ARGUMENT

There is no reason to grant the instant Petition for Writ of Certiorari since none of the issues pressed are worthy of this Court's consideration and since there is no tension between the First Circuit's decision and that of any other Circuit or of any decision by this Court. The instant case is remarkable only for the lack of foundation for Petitioners' claims – they offered no proof to support any of their grandiose claims, and what little evidence was offered was deemed "patently incredible" by the trier of fact. Since they did not contest these findings at the Appellate level, they stand at this level. Quite significant are the rulings by the trial and Appellate courts that Petitioners lack standing to press the Commerce Clause claims they now seek to have this Court consider.

As for the merits, the most serious flaw in every facet of the Petitioners' case is the lack of proof to substantiate any of their constitutional claims. They simply failed to offer evidence to prove their case, relying instead on arguments more suited for the academic arena than the

adversarial process of litigation, or, as Judge Selya described it, a "rodomontade."[7] (Pet. App. 25). As the Circuit put it, their First Amendment claim was "extravagant" and "lacked force" (Pet. App. 8); their argument regarding shared trade names did not "survive scrutiny" (Pet. App. 12), and indeed that the findings of the trial court – including that the use of shared trade names was misleading – were not even contested by the Petitioners. (Pet. App. 13). As to the Commerce Clause dissertations offered by the Petitioners, Judge Selya wrote that they failed to show any cognizable harm, direct or indirect, attributable to the residency requirements (Pet. App. 18); and that the "brazen claim" made by Petitioners of a discriminatory purpose was supported only by "isolated snippets" of statements made by counsel, but not by any evidence. Discarding the Commerce Clause argument relative to discriminatory purpose, Judge Selya wrote that Petitioners' case "elevated hope over reason." (Pet. App. 21). In rejecting their claim of discriminatory effect, the Circuit wrote that the Petitioners failed to offer compelling evidence of such an effect. "There is, for example, no evidence of any carve-out or other device that would enable in-state entities to evade the challenged restriction, nor is there any hint of a home-field advantage in connection with the State's enforcement of the restrictions. The absence of any such evidence is telling." (Pet. App. 22). As to the allegations of an impermissible territorial reach, the Circuit wrote that it was supported only by "sketchy arguments," and that Petitioners had "not come close to showing that the burdens they envision are excessive in relation to the statutory scheme's legitimate goals." (Pet. App. 23-24).

There is absolutely no factual basis for the claims made in the Petition concerning Rhode Island's retail liquor industry. (Petition at 2-6). Petitioners' arguments concerning "big-box stores" and something they term a "sheltered market" are simply arguments, continuing their

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[7] "Vainglorious boasting or bragging; pretentious, blustering talk." Dictionary.com Unabridged (v.1.1 2007).

habit of making statements without any evidentiary foundation. Also, they ignore the decisions that led us to this point, and the attempt by the courts below to outline what they *can* do, as well as what they cannot do. One example is the statement in the Petition at page 9: "Stores cannot adopt business efficiencies developed by other retailers." The District Court instructed them over two years ago that the franchisor, Wine and Spirits Retailers "remains free to provide licensees with planning and/or marketing advice which, during the hearing, it described as advice regarding marketing, methods of doing business, what products to sell, and how to set up a store." 364 F. Supp. 2d at 176. Also, continuing the practice of inserting completely new arguments into this case at every turn, the Petition, part II, contains material and argument never submitted to either the District or Circuit courts. This Court should thus give no consideration to these materials, or this argument.

Simply put, Petitioners failed to prove that they engage in activity that is protected by any provision of the United States Constitution. What was shown was a tightly interrelated chain of stores engaged in employee sharing, price fixing, product restrictions and general anti-competitive, collusive conduct. The law is aimed at curbing this harmful conduct, and not protected speech or interstate commerce. To give any credence to Petitioners' arguments would be to do a great injustice to expression that rightly deserves Constitutional protection.

ARGUMENT

I. Rhode Island Has Extensive Authority To Regulate The Business Of Selling Alcoholic Beverages.

Any consideration of the validity of Rhode Island's regulation of the sales of alcoholic beverages must acknowledge the State's significant power in this area. Since its passage in 1933, the Twenty-first Amendment has been deemed to confer broad powers on the states in the area of liquor regulation. *California Retail Liquor Dealers Assoc. v. MidCal Aluminum, Inc.*, 445 U.S. 97 (1980). Although the

States acknowledge that the sale of alcoholic beverages is lawful, it is regarded as "a thing apart, a commodity with a potential for social harm unlike cabbages and candlesticks. . . ." *Granite State Grocers Assoc. v. State Liquor Comm'n.*, 289 A.2d 399 (N.H. 1972).

Immediately after passage of the Twenty-first Amendment, the State of Rhode Island established a regulatory scheme to oversee the business of selling alcoholic beverages. The overarching purpose is " . . . the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-1-5. The specific purpose of the 2004 amendments is "to promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11(a).

The State of Rhode Island regulates the alcoholic beverage industry using the "unquestionably legitimate" three tier distribution system. *North Dakota v. United States*, 495 U.S. 423 (1990); *Granholm v. Heald*, 544 U.S. 460 (2005). It is clear that within the area of its jurisdiction, the State has virtually complete control over the importation and sale of liquor and the structure of the liquor distribution system. *Id.* Ensuring orderly market conditions in the industry is a core interest served by the Twenty-first Amendment. *Id.* The Twenty-first Amendment has been construed as "grant[ing] the State virtually complete control over whether to permit importation or sale of liquor *and how to structure the liquor distribution system." Midcal, supra,* 445 U.S. at 110 (emphasis supplied).

In reviewing the *raison d'etre* for the administrative body overseeing the alcoholic beverage industry, the Rhode Island Supreme Court said in 1934 that it "was created for the purpose of regulating and controlling a business which experience has taught must be strictly controlled in the interest of public health, morals, and safety. The public has therefore a vital interest in the determination of the manner in which the alcoholic beverage commission

should perform the duties imposed upon it by the statute. . . ." *Clark v. Alcoholic Beverage Comm'n*, 170 A. 79 (1934). Several years later, the State's highest Court again examined the necessity for the State's close regulation of the sales of alcoholic beverages. In *Baginski v. Alcoholic Beverage Comm'n*, 4 A.2d 265 (1939), our Supreme Court explained that the statutes were a "familiar and well-recognized example of the legitimate exercise of the police power. The act is entitled an act to promote temperance and to control the manufacture, transportation, possession and sale of alcoholic beverages. Its chief purpose may, without question, be said to be the safeguarding of the public health, safety and morals." 4 A.2d at 266-67. The Rhode Island Supreme Court continued, stating:

> The traffic in intoxicating liquors has ever been a prolific source of evils, gravely injurious to the public welfare. The need of its regulation and control is undisputed. In a search for a system of effective, impartial and uniform regulation and control of this traffic our legislature enacted the above chapter which was later amended. . . .

Id. at 267.

Since the repeal of prohibition, the State of Rhode Island has determined that liquor retailers should not be allowed to do business as "chain store organizations." R.I. Gen. Laws §§ 3-5-10, 3-5-11. Until 2004, the statutory scheme did not contain a specific listing of the indicia of a chain store organization. At that time, the General Assembly amended the statute, outlining several factors that would weigh in favor of a finding that a chain store organization existed. The amendment also prohibited franchise relationships in the retail liquor industry.

The First Circuit likened the 2004 amendments to antitrust laws, which are the "Magna Carta of free enterprise." *Midcal*, *supra*. (Pet. App. 69). The State clearly has a compelling interest in prohibiting anticompetitive, collusive conduct, of the type described at the trial of this case. It is axiomatic that any conspiracy that has an impact on the price structure of any category of goods is illegal.

Schnapps Shop, Inc. v. H.W. Wright & Co., Ltd., 377 F. Supp. 570 (D.Md. 1973). The evidence at trial showed that representatives from stores routinely met to fix prices, and they still do it, albeit in a more vertical fashion. Where a party shows a *per se* violation of the antitrust laws, such as price-fixing, no further proof of public injury is required. *Id.* The First Circuit recognized the State's "historic right to regulate market forces in the retail liquor industry." (Pet. App. 72).

The decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) makes it clear that the State can, and must, prohibit the "business plan" touted by Petitioners. In *Giboney*, this Court rejected arguments that union picketing was protected by the First Amendment against action based on an anticompetition statute. Nearly sixty years ago, Justice Black wrote: "That states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade is beyond question." 336 U.S. at 495. That statute, like this one, was upheld because its purpose is to secure competition and preclude combinations that tend to defeat it. At that early date, this Court recognized that "it is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions." *Id.* at 496 (citation omitted). The holding that the union picketing did not enjoy protection so as to invalidate the anticompetition statute rested on the premise that "legislative power to regulate trade and commerce includes the power to determine what groups, if any, shall be regulated, and whether certain regulations will help or injure businessmen, workers, and the public in general." *Id.* at 497. In rejecting the claim that the picketers were simply trying to get a message across, this Court acknowledged:

> It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced,

> or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Id. at 502.

Since it was "clear that the [picketers] were doing more than exercising a right of free speech or press," rather, they were "exercising their economic power together with that of their allies" the constitutional challenge failed. Even outside of the alcoholic beverage industry, the harmful effects of franchising can be lessened by state regulation. *See Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206 (1st Cir. 1994).

II. The Commerce Clause Is Not Implicated By Rhode Island's Chain Store Prohibition, Which Counts All Retail Liquor Licenses In Determining Whether A "Chain" Exists, Regardless Of Location. Furthermore, Petitioners Lack Standing To Challenge The Residency Requirement For Class A License Holders.

A. Petitioners Lack Standing.

Petitioners allege that R.I. Gen. Laws § 3-5-10's residency requirement and § 3-5-11, prohibiting owners of liquor stores in other states from obtaining a Class A license in Rhode Island, violate the Commerce Clause found in Article I, sec. 8 of the United States Constitution.[8] At the outset, it must be determined whether there is

[8] The Commerce Clause allegations were so undeveloped during the course of this case that Judge Torres, who had presided over the case for two years since its filing, was unaware that they existed until the first day of trial. (C.A. App. 26).

Article III jurisdiction as to that Count. Clearly, there is not, since the Petitioners are either Rhode Island residents or corporations, and there is no claim that any have sought or have been refused a Class A license for any reason. (C.A. App. 74). *See Allendale Leasing, Inc. v. Stone*, 614 F. Supp. 1440 (D.R.I. 1985); *McCollester v. City of Keene, N.H.*, 668 F.2d 617 (1st Cir. 1982). Evidence offered at trial indicated that John Haronian is a Rhode Island resident with no desire to obtain a Class A license and that the corporate plaintiffs are all Rhode Island corporations (C.A. App. 74). There is no resident of any other state who has sought, or who has even considered seeking, a Class A license in Rhode Island. The District Court recognized this and also found that the residency requirement lent no support to the Commerce Clause argument, since

> . . . whether a non-resident may obtain a Class A license has nothing whatever to do with the prohibition against chain stores and franchises, because even if an out-of-state entity could obtain a Class A license, it, like local Class A licensees, still would be prohibited from operating a chain store or participating in a franchise operation. So whether it is or is not constitutional for Rhode Island to only grant Class A licenses to local entities has no bearing whatsoever on the validity of the prohibition against franchises and chain stores.

(Pet. App. 43).

Petitioners cite First Amendment overbreadth law for the untenable proposition that they may assert the constitutional rights of an unknown and undefined class of nonresidents who may at some point wish to obtain a Class A license in Rhode Island. This Court has not extended the notions of standing quite so far. All of the cases relied upon by the Petitioners in support of their standing argument found a legally cognizable injury suffered by *somebody* sufficient to invoke the jurisdiction of the federal court. That is not the case here. These parties wish to have an advisory opinion from this Court, with no concrete "case or controversy" to support it.

Indeed, a finding that there is standing as to this issue, and that this small part of the statute violates the Commerce Clause would give these Petitioners little relief,

since it would not void the prohibitions on chain stores or franchises. *See* R.I. Gen. Laws § 3-1-6 (severability clause). Since this Court is not in the business of rendering advisory opinions, and given the caveat on avoiding constitutional issues when possible, the residency requirement attack should fail at the outset.

B. The Commerce Clause Is Not Implicated.

This Court should not grant this Petition based on the Commerce Clause arguments concocted by the Petitioners because they go far beyond the allegations of their Complaint and the scope of the record before the trial court. The Amended Complaint simply alleges that the residency requirement of R.I. Gen. Laws § 3-5-10 "restricts the ability of out of state individuals to do business within Rhode Island" and therefore discriminates against interstate commerce. The Amended Complaint also alleges, as to § 3-5-11, that Rhode Island "prohibits owners of liquor stores in other states from obtaining Class A license in Rhode Island" and therefore "discriminates against interstate commerce in violation of the Commerce Clause." (App. 6). Petitioners should be held to their pleadings and should not be allowed to interject new arguments into this case at this juncture.

The District Court found that these Appellants did not "even come close" to proving a Commerce Clause claim. (Pet. App. 40). After finding that there was no standing to attack the residency requirement, the trial court determined that the Twenty-first Amendment had some application to the single Class A license limitation. First, the District Court found that "The statute by its terms applies across the board regardless of whether the franchisee is local or out-of-state. Nor have the plaintiffs presented any evidence that despite their facial neutrality these sections have the practical effect of discriminating against out-of-state sellers." (Pet. App. 41). Not surprisingly, the District Court found that the Appellants had misread and misapplied the decision in *Walgreen Co. v. Rullan*, 405 F.3d 50 (1st Cir. 2005), since Rhode Island had not conferred any

competitive advantage on in-state sellers over out-of-state sellers – both categories are limited to holding only one Class A license. "[T]he statute contains no exemption for local liquor stores. They're not exempt from the prohibition against franchising or operating chain store organizations. . . ." (Pet. App. 42). Finding that the limitation applied evenhandedly, the Court rejected the Commerce Clause claim.

After the First Circuit found that the Petitioners lacked standing to challenge the residency requirement, they addressed the sweeping claims that the overall statutory scheme was motivated by a discriminatory purpose and had an impermissible extraterritorial reach, finding both arguments to be unpersuasive. After first noting that the Petitioners had the burden of proving that the statute was prompted by a discriminatory purpose, the Circuit found that Petitioners' entire case as to discriminatory purpose was contained in "isolated snippets" of responses to discovery questions. (Pet. App. 19). The First Circuit declined to make the "quantum leap" required to accept Petitioners' arguments on this issue, instead looking to the words of the statute to determine its purpose. The purpose of the 2004 amendments is "to promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." R.I. Gen. Laws § 3-5-11.1(a). The Circuit held that the Petitioners did not offer any convincing reason for doubting these formal statements of legislative purpose. (Pet. App. 20).

Next, the Circuit addressed the claims of discriminatory effect, and found Petitioners' interpretation of its decision in *Walgreen Co. v. Rullan*, *supra*, "overly expansive." (Pet. App. 21). In rejecting that the instant case bore any resemblance to *Walgreen*, the Circuit wrote that

> . . . the plaintiffs adduced no evidence that the prohibition on franchise and chain-store arrangements, in itself, has had, or threatens to have, a debilitating or unfair impact either on competition or – leaving aside residency requirements – on out-of-state enterprises in particular.

> There is, for example, no evidence of any carve-out or other device that would enable in-state entities to evade the challenged restrictions, or is there any hint of a home-field advantage in connection with the State's enforcement of the restrictions.

(Pet. App. 21, 22).

Finally, the Circuit rejected the "sketchy" arguments offered as to the statute's impermissible territorial reach, recognizing that "the district court did not address this claim, presumably due to shortcomings in the manner of its presentment. Even assuming that this argument was squarely presented, it does not profit the plaintiffs' cause." (Pet. App. 23). Instead, they found that the chain store prohibition was "neutral" and "evenhanded." (Pet. App. 24). Continuing the theme that the Petitioners failed miserably in offering proof to support their claims, the Circuit wrote that "[t]he plaintiffs have the obligation of proving excessiveness, and they have not come close to showing that the burdens they envision are excessive in relation to the statutory scheme's legitimate goals," and noted that this Court "previously has rejected the notion that the dormant Commerce Clause protects particular business structures or methods of operation." (Pet. App. 24).

The decision of the First Circuit is in harmony with this Court's recent decision in *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, ___ U.S. ___, 127 S.Ct. 1786 (2007). That case made it clear that laws that treat private businesses, "whether in state or out-of-state, exactly the same, do not discriminate against interstate commerce for purposes of the Commerce Clause." ___ U.S. ___, 127 S.Ct. at 1790, 1797. Since the decision of the First Circuit is in full accord with the most recent teachings of this Court on the subject of the Commerce Clause, there are no grounds to grant certiorari.

III. The Statute At Issue Is Aimed At Conduct, Not Speech, Therefore, The First Amendment Is Not Implicated.

At every turn, the lower courts emphasized that the statute targeted conduct, not speech. Petitioners refuse to accept this finding. Testimony offered by John Haronian, describing the monthly meetings where store representatives met to set prices on products, led to this conclusion. The First Circuit correctly found that the chain store prohibition does not target speech because "each individual licensee remains at liberty to disseminate information about its prices and products to other stores and to the public at large. . . . This statute merely proscribes conduct – the launching of advertisements resulting from pre-agreed commercial strategies. Such is not a ban on commercial speech." (Pet. App. 8). Just because these Petitioners stubbornly insist that the First Amendment protects their collusive activities does not make it so.

This Court has rejected outright a claim that conduct that has incidental elements of speech is entitled to any First Amendment protection. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, ___ U.S. ___, 126 S.Ct. 1297 (2006), the Court addressed complaints that the "Solomon Amendment" requiring that military recruiters be given access to college campuses, was "compelled speech" in violation of the First Amendment. The Court found that the "speech" involved was

> plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed'

Id. at 1308. The following mandates a finding that Petitioners' position is without merit:

> Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only"

> hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.

Id. at 1308, citing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

In *Rumsfeld,* this Court chastised the challengers, stating that their position "trivializes" the freedoms protected by the Constitution and prior precedent. "In this case, [petitioner] has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect." The argument was found to "plainly overstate[] the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents." 126 S.Ct. at 1313. This holding is entirely consistent with prior Supreme Court precedent. For example, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court found no element of protected expression in sexual activity at a book store. There, the Justices found the store's argument too restrictive, "since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." Continuing, the Court reminded that the Constitution does not

> traditionally subject[] every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a *significant* expressive element that drew the legal remedy in the first place, as in *United States v. O'Brien*, 391 U.S. 367 (1968) or where a statute based on a non-expressive activity has the inevitable effect of singling out those engaged in expressive activity. *O'Brien* has no relevance to a statute directed at imposing sanctions on non-expressive activity.

Id. (emphasis supplied). Clearly, Rhode Island's ban on "coordinated or common" advertising is not aimed at

Petitioners' protected speech. The activity curbed is that which is necessary for the joint advertising to occur, namely the stores' collusive agreements regarding prices and product. This is well within the State's regulatory power.

In *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), the First Circuit refused to invalidate regulations aimed at non-communicative impact, notwithstanding a degree of adverse impact on communication. *Wirzburger* first found that citizens' use of the ballot initiative process constituted expressive conduct. However, the decision also correctly found that the regulation in question was not aimed at regulating speech. The Circuit wrote that government actions that are aimed at some goal other than restricting the conveyance of ideas are generally permissible even if they incidentally inhibit free speech. Enforcement of a prohibition with only incidental effects was found not to implicate the First Amendment, and such a law is measured only by a rationality standard.

Petitioners' attempt to shoehorn this case into a commercial speech dispute should fail. Commercial speech is the transmission of the notion that a party wishes to sell a product for a certain price. This type of speech is simply not affected by any state law or regulation at issue. What is prohibited is the joint activity of agreeing to sell a product at a particular price and then publishing the result of this collusive agreement to consumers.

Even applying the commercial speech test, however, Petitioners lose. Commercial speech, protected to some degree by the First Amendment, consists of the "ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001). Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." *Pharmaceutical Care Mgmt. Assoc. v. Rowe*, 429 F.3d 294 (1st Cir. 2005). This case does not prohibit the disclosure of any economic information to consumers. Rather, it prohibits the agreement that necessarily precedes a joint advertisement about price and product. It also prohibits the communication

that the parties are engaged in illegal activity – a chain store operation. The statutes further an important governmental interest, discussed *supra,* and do so as narrowly as possible. All information is allowed; the manner in which it is transmitted is the only action regulated.

The basis for both the trial court and Circuit's decision is the misleading nature of the use of the "Douglas" name. At trial, John Haronian testified that each store was independently owned and operated, yet they fly the same banner, use the same colors, place for sale the same advertisements, use identical in-store flyers touting the same products for the same prices, sold by employees dressed in the same "Douglas" garb. False testimony that the stores are independent in light of these facts (which emphasize the "conduct v. speech" dichotomy) highlight the unassailable finding that the advertisements are misleading.

The District Court made detailed factual findings, which are binding on the Petitioners, since they were not contested on appeal. A review of these facts highlights that the decisions below were correct, and that no Writ should issue from this Court:

1. Since 1933, Rhode Island has statutorily prohibited the retail sale of alcoholic beverages by what the statute has historically referred to as "chain store organizations." (Pet. App. 31).
2. Wine & Spirits Retailers (W&SR) and all of the individual stores that are franchisees are Rhode Island entities, corporations, or individuals. (Pet. App. 31).
3. Prior to the denial of the Preliminary Injunction, W&SR and the stores were parties to a Franchise Agreement that contained the following provisions and had the following characteristics:
    - Each franchisee was given an exclusive franchise within a specified geographic area. The franchisees each had different corporate names that were significantly different in

most cases. All did business under the name "Douglas Wine and Spirits."

- Franchisees were required to carry certain products and prohibited from carrying other products by W&SR. Further, W&SR specified the vendors from whom the franchisees could purchase products and the layout of the stores.
- Franchisees were required to pay an annual franchise fee and to contribute to an advertising and promotion fund that was controlled by W&SR. W&SR could terminate the Franchise Agreements at any time due to a failure of the franchisee to comply with the terms of the Franchise Agreement.
- Franchisees displayed posters and other literature at their stores containing references to the Douglas website. On behalf of all of its franchisees, W&SR negotiated with liquor wholesalers for volume discounts, and every two weeks W&SR placed ads in the Providence Journal newspaper on behalf of all participating stores, and those ads listed the products for sale at all Douglas stores and the prices charged for those products. (Pet. App. 31-32).

4. The "Franchise Agreements" have been replaced by "Consulting Agreements." Despite the semantics, very little has changed. There are still exclusive territorial provisions and all stores continue to do business under the banner of "Douglas Wine and Spirits." The only difference is that each store has added a single word naming the town in which the store is located. (Pet. App. 32-33).
5. W&SR still negotiates prices with wholesalers on behalf of all Douglas stores. (Pet. App. 33).
6. W&SR issues "Marketing Bulletins" telling stores what to carry and what prices to charge.

These are much more than mere "suggestions", as Petitioners urged. (Pet. App. 33).

7. Products are priced by a computer system by W&SR. The managers at the individual stores can mark down individual products. W&SR still issues suggestions regarding dress codes for employees and how each store is to be configured. (Pet. App. 33).

8. Advertisements are still placed in the Providence Journal every two weeks, except now they bear the name of only one store. Each prominently displays the "Douglas Wine and Spirits" logo, in large, bold face type followed by the location of the store that purportedly placed the advertisement, which appears in much smaller type, far less likely to be noticed by the reader. (Pet. App. 33).

9. The advertisements are paid for by a company called Tri-State, an affiliate of DWS. (Pet. App. 33).

10. All other stores display exact copies of each ad and offer the same products for the same prices listed in the ad, and they still pay a fee to W&SR for its advice and services and W&SR retains its right to cancel the relationship. (Pet. App. 33-34).

11. Rarely, if ever, would any store fail to offer a product shown in an ad at the price specified in the ad. (Pet. App. 34).

12. Stores charge identical prices for the non-advertised products that were randomly surveyed by an investigator from the state. (Pet. App. 34).

These uncontested findings establish that these Petitioners have engaged in harmful conduct for many years. Such conduct is not protected by the First Amendment, and the Petition should be rejected.

IV. Similar Legislation Has Consistently Been Upheld Against Constitutional Attack.

As part of the legislative grant of authority to control the traffic in alcoholic beverages, the assurance that the commercial aspects of the industry are operated under the conditions of free and unrestricted competition are worthy and constitutionally permissible goals. Nor is this legislation unusual.

Numerous states have historic limits on chain store operations in the liquor industry. In Massachusetts, factors considered under a previous statutory scheme in determining whether a chain store relationship existed were, among other things, single group insurance policies covering employees of all corporations; sharing common bookkeeping offices; substantial intercompany dealings; and who the employees are hired by and work for. *See Cleary v. Cardullo's, Inc.*, 198 N.E.2d 281 (Mass. 1964). That statutory limit of three stores was upheld against an equal protection attack in *Johnson v. Martignetti,* 375 N.E.2d 290 (Mass. 1978). That Court correctly found that the regulatory scheme was aimed at the business relationships and their positive effect on commerce and competition:

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business.

Id. at 297 (citations omitted).

In *Parham v. Oklahoma Alcoholic Beverage Control Board*, 412 P.2d 142 (Okla. 1966), the Oklahoma Supreme Court upheld, against a dual constitutional attack[9] a rule

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[9] Unconstitutional delegation of powers and due process.

requiring wholesalers to maintain minimum inventories of certain of the most popular brands of alcoholic beverages. In beginning its analysis, that Court stated:

> At the outset we must recognize that the liquor industry because of the very nature of its product requires strict control and close supervision. As a result, the Legislature by virtue of the police power of the State possesses broad powers to regulate and supervise all phases of traffic in intoxicating liquors. It is a generally accepted concept that 'the power of a state to regulate and restrict the liquor traffic' is far broader than the power to regulate or restrict ordinary businesses, because of its effect on the health and welfare of the public.

412 P.2d at 147.

The rule requiring a fourteen-day inventory of the most popular brands was read as expressing an intent on the part of the Oklahoma legislature that, " . . . within the framework of strict regulation which the liquor industry by its nature requires, the commercial aspects of the industry shall be operated under the conditions of free and unrestricted competition." *Id.* at 148. The Court upheld the rule, because it was " . . . clear that under the voluntary franchise agreement adopted by the wholesalers the extensive competition heretofore existing between wholesalers selling the same brands of liquor would be destroyed." There was no doubt in that case that the rule was specifically designed "to combat the voluntary franchise system. However, we make no determination of the wisdom of a liquor franchise system, be it voluntary or involuntary. That is a matter for determination by the Legislature and the people of the State of Oklahoma." *Id.* at 149. The legislative purpose, as exists in the case *sub judice*, was unrestricted commercial competition.

In *Granite State Grocers Assoc. v. State Liquor Comm'n*, 289 A.2d 399 (N.H. 1972), a prohibition against any person holding more than two off-site beverage permits was held not to deprive owners of the chain stores of their equal protection rights, nor was it found to violate

the federal Commerce Clause. The prohibition in that case was similar to that here – with New Hampshire allowing a chain of two, instead of the absolute prohibition here. In examining that scheme, the New Hampshire Court wrote that "The obvious purpose of this well-rounded regulatory system is to supervise and to fractionalize the beverage industry. . . ." The Court noted that "at least twenty states similarly restrict the number of alcoholic beverage permits. Such statutes have been held constitutional as serving a public purpose in the two states where the question has been considered." *Id.* at 400 (citations omitted). The lament of the Petitioners is the same as that rejected in *Granite State*:

> Regulations against concentration in the alcoholic beverage business necessarily discriminate against chain stores. . . . Discrimination based on size is not unconstitutional so long as it serves a bona fide public purpose. . . . The legislative motives in enacting economic and trade regulations, particularly in the regulation of alcoholic beverages, may require less stringent scrutiny and justification than in other so-called personal-rights decisions.

Id.

The assurance of equitable basis for competition was held enough to immunize a statute against an equal protection challenge in *Reinfeld v. Schieffelin & Co.*, 466 A.2d 563 (N.J. 1983). The following rationale applies with equal force in this case:

> The ultimate goal sought to be attained by the statute in question, as in the entire scheme of liquor legislation, is the protection of the public through the promotion of temperance and elimination of the racketeer and bootlegger. In order to accomplish this purpose the statute seeks to achieve as far as necessary the independence of wholesalers from distillers. A wholesaler dependent upon a distiller for a supply of sought-after merchandise might be tempted to comply with the non-legitimate desires of the distiller if the latter were free to discontinue the supply at will. For the purpose of strengthening the wholesaler's resistance

> if confronted with a distiller's wish to overstimulate sales and thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts, *e.g.*, tie-in sales, the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler.

Id. at 567. The same is true here – the fortunes of the franchisees' are inextricably intertwined with that of the W&SR who controls the day-to-day operations of each store. "However inconvenient the statute might be to [the franchisor's] and [the franchisees'] trade, even bona fide business policy in the field of liquor traffic must yield to the policy of the State." *Id.* at 568 (citation omitted). In rejecting an equal protection challenge, the New Jersey Court correctly recognized that "Liquor dealers are not a suspect class, nor is liquor distribution a fundamental right." In deciding that the statute was fundamentally and constitutionally sound, that Court decided that a legislature's "practically limitless" power to regulate the sale of intoxicating beverages accentuates the normal deference afforded by the "rational basis" test. Although that power was broad even before the passage of the Twenty-first Amendment, the latter has been read to give states plenary power to regulate the sale and distribution of liquor, and it permits classifications that relate to that regulatory function. The Court upheld the legislation as having a rational basis in the promotion of temperance, in that it would free from any illegitimate demands that suppliers might make those wholesalers who have become dependent on a supplier. That rationale is easily applied here.

In *Grand Union Company v. Sills*, 204 A.2d 853 (N.J. 1964), a similar law was upheld against due process and equal protection attacks even though the Court recognized that it would curb chain store liquor operations and aid small liquor dealers. Initially, that Court acknowledged that the

> legislation was entitled to the various presumptions of constitutionality which attend on judicial review of statutory enactments, and to aid from the doctrine that factual support for the legislative

> judgment would be presumed, and absent a sufficient showing to the contrary, the court would assume that the enactment rested upon some rational basis within the knowledge and experience of the Legislature.

As for the purpose found advanced by the statute: "They were designed to aid in the stabilization of the industry and in the promotion of temperance through the curbing of competitive practices which tended to stimulate sales." *Id.* This case is indistinguishable from those and the result should be the same.

A nearly identical attack was launched by these same Petitioners in *Peoples Super Liquor Stores v. Jenkins*, *supra*, and the same result obtained. As in this case the Petitioners presented "sparse" arguments, and their claims as to the First Amendment and Takings claims were rejected on Motion to Dismiss. The only claim that survived that initial disposition was the Commerce Clause claim, and the litigation was terminated before a decision could be reached.

The cases relied upon by the Petitioners to establish discord in the Circuits simply do not. They all involved cases of uncontroverted protected speech, which is not implicated here. None of those decisions involves action by the State to regulated anticompetitive, collusive conduct as is present here. Since they are not "tantamount to antitrust" cases, they should not be considered at all relevant.

CONCLUSION

The State's job is to legislate and regulate. In the area of alcoholic beverages, the State has wide latitude in determining how to structure the liquor distribution system. This statute is no more than one designed to ensure that consumers have choices, and its purpose was to end price-fixing. The evidence adduced at trial showed that Petitioners actions removed choice as to price and product by directing all aspects of the business from one central location, to the detriment of consumers. If every

store, every product, and every price is the same – consumer choice is negatively affected. The reach of the statute is only as far as need be.

The decision of the First Circuit is not in conflict with that of any other Circuit, or with any decision of this Court. To the contrary, it is merely the latest in a line of decisions upholding similar chain store bans in the retail liquor industry. This Court should decline to issue a Writ of Certiorari in this matter.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS, DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS N. PROVIDENCE, INC., *Plaintiffs,* *v.* STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, and JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, *Defendants,* *and* UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND, *Defendant-Intervenor.*	Civil Action No. 04-418-T

FIRST AMENDED COMPLAINT

(Filed Dec. 22, 2005)

Nature Of The Action

1. Plaintiffs allege violations of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, §8 of the Constitution of the United States.

2. Sections 3-5-11 and 3-5-11.1 of the Rhode Island General laws unconstitutionally restrict the rights of speech and association and deny the Plaintiffs of their right to Equal Protection of the laws by denying them fundamental rights in a discriminatory manner.

3. Additionally, §3-5-10 discriminates against interstate trade in violation of the Commerce Clause of the Constitution of the United States.

Jurisdiction

4. This Court has subject matter jurisdiction over this action under 28 U.S.C. §1331, because the matter in controversy arises under the Constitution and laws of the United States. Plaintiffs' right to judicial review of the actions complained of is secured by 42 U.S.C. §1983.

5. Venue in this Court is proper under 28 U.S.C. §1391 because the events giving rise to this claim have occurred, and will occur, within the District of Rhode Island.

The Parties

6. WINE & SPIRITS RETAILERS, INC. (W&S) is a corporation organized under the laws of Rhode Island. W&S was the franchisor of Douglas Wine and Spirits (DW&S) and People's Liquor Warehouse (People's). W&S

currently sells business advice and advertising services as a consultant to liquor stores.

7. JOHN HARONIAN is a resident of Rhode Island who provides business advice to liquor stores within the state of Rhode Island. His ability to continue to provide this advice is restricted by the amended liquor control law.

8. DOUGLAS WINE & SPIRITS – CUMBERLAND, INC. (DW&S – CUMBERLAND) is a corporation organized under the laws of Rhode Island. DW&S – CUMBERLAND operates a liquor store. Until recently nullified by §3-5-11.1, DW&S – CUMBERLAND had a franchise agreement with W&S and enjoyed the benefits of the joint advertising, trade name and business advice that resulted from that agreement.

9. DOUGLAS WINE & SPIRITS N. PROVIDENCE, INC. (DW&S – N.PROVIDENCE) is a corporation organized under the laws of Rhode Island. DW&S – N.PROVIDENCE operates a liquor store. Until recently nullified by §3-5-11.1, DW&S – N.PROVIDENCE had a franchise agreement with W&S and enjoyed the benefits of the joint advertising, trade name and business advice that resulted from that agreement.

10. DOUGLAS WINE & SPIRITS – CRANSTON, INC. (DW&S – CRANSTON) is a corporation organized under the laws of Rhode Island. DW&S – CRANSTON operates a liquor store. Until recently nullified by §3-5-11.1, DW&S – CRANSTON had a franchise agreement with W&S and enjoyed the benefits of the joint advertising, trade name and business advice that resulted from that agreement.

11. Defendant STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS is a governmental unit,

which promulgates laws and regulations which are binding upon the Plaintiffs. RHODE ISLAND has enacted the statutes at issue in this litigation.

12. Defendant JEFFREY J. GREER, is the Associate Director of the Department of Business Regulations (DBR). In his capacity as Associate Director of the Division of Business Regulation, Division of Commercial Licensing and Regulation, GREER is tasked with enforcing the unconstitutional statutes at issue in this litigation. GREER is being sued in his official capacity only.

13. UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND is an organization of liquor stores from Rhode Island and Massachusetts, which has intervened in this action as a defendant.

Facts Common to All Claims

14. The Plaintiffs seek to restore their franchise relationships.

15. The Plaintiffs seek to speak to their prospective customers through joint advertising and through the use of the name Douglas Wine & Spirits.

16. The Rhode Island General Assembly enacted Rhode Island General Laws §§ 3-5-10, 3-5-11 and 3-5-11.1.

17. Section 3-5-11 bans the ownership of multiple Class A liquor licenses by the same individual or corporation.

18. Section 3-5-11.1 bans the holders of Class A licenses from participating in franchises. Section 3-5-11.1 took effect on April 1, 2004.

19. DW&S – CUMBERLAND, DW&S – N.PROVIDENCE and DW&S – CRANSTON had franchise agreements with W&S. Those agreements have been nullified by §§3-5-11, as amended, and 3-5-11.1.

20. DW&S – CUMBERLAND, DW&S – N.PROVIDENCE and DW&S – CRANSTON currently seek to purchase business advice and marketing services from W&S. This relationship is threatened by §3-5-11, as amended.

21. The elements of §3-5-11 are not separable.

22. The elements of §3-5-11.1 are not separable.

COUNT I
First Amendment to the Constitution of the United States – Speech

23. Sections 3-5-11 and 3-5-11.1 prohibit the Plaintiffs from engaging in expression protected by the First Amendment to the Constitution of the United States.

COUNT II
First Amendment to the Constitution of the United States – Assembly

24. Sections 3-5-11 and 3-5-11.1 violate the Plaintiffs' rights secured by the First Amendment to the Constitution of the United States by prohibiting the Plaintiffs from forming an expressive association.

COUNT III
First Amendment to the Constitution of the United States – Unfettered Discretion

25. The enforcement mechanism of §3-5-11's prohibition of chain stores permits unfettered discretion by the DBR in permitting some Class A to engage in the prohibited activities while not permitting others.

26. This unfettered discretion in the permitting or prohibiting of the First Amendment activities described above renders §3-5-11 unconstitutional.

COUNT IV
Article I, §8 of the Constitution of the United States (Commerce Clause)

27. Section 3-5-10 requires the owners of Class A license to be residents of Rhode Island.

28. This restriction limits the ability of out of state individuals to do business within Rhode Island.

29. Section 3-5-10 discriminates against interstate commerce and therefore violates the Commerce Clause.

30. Section 3-5-11 prohibits owner of liquor stores in other states from obtaining a Class A license in Rhode Island. Section 3-5-11 thereby discriminates against interstate commerce in violation of the Commerce Clause

COUNT V
Fifth Amendment to the Constitution of the United States

31. Sections 3-5-11 and 3-5-11.1 eliminates the reasonable investment backed property rights of the Plaintiffs in

their businesses and the value of their existing contractual relationships.

32. The unconstitutional taking of the Plaintiffs' property has caused damage to them in an amount to be proven at trial.

COUNT VI
Fourteenth Amendment to the Constitution Laws of the United States

33. Sections 3-5-11 and 3-5-11.1 deny fundamental rights to the Plaintiffs.

34. Sections 3-5-11 and 3-5-11.1 treat the Plaintiffs differently from similarly situated other individuals and businesses.

COUNT VII
Deprivation of Rights Secured by the Constitution and Laws of the United States in Violation of 42 U.S.C. §1983

35. Sections 3-5-10, 3-5-11 and 3-5-11.1 deprive the Plaintiffs of rights or privileges secured by the Constitution and laws of the United States.

36. This deprivation of rights has and will occur under color of law.

WHEREFORE, Plaintiffs respectfully request the following relief:

A. Enter judgment declaring §§3-5-11 and 3-5-11.1 violate the First Amendment to the Constitution of the United States; and

B. Enter judgment declaring §§3-5-10 and 3-5-11 violate Article I, §8 of the Constitution of the United States; and

C. Enter judgment declaring §§3-5-11 and 3-5-11.1 violate the Fifth Amendment to the Constitution of the United States; and

D. Enter judgment declaring §3-5-11 and 3-5-11.1 violate the Fourteenth Amendment to the Constitution of the United States; and

E. Enter judgment declaring that §§3-5-10, 3-5-11 and 3-5-11.1 have deprived the Plaintiffs of rights secured by the Constitution and laws on the United States in violation of 42 U.S.C. § 1983; and

F. Enter judgment declaring that §3-5-11(b)(1)(ii) violates 29 U.S.C. §1001; and

G. Permanently enjoin the defendants from enforcing §§3-5-10, 3-5-11 and 3-5-11.1; and

H. Award to Plaintiffs the costs of this action, including attorney fees as provided for by 42 U.S.C. §1988 and 29 U.S.C. §1132(g)(1); and

I. Award such other relief as the Court may deem just.

Dated: December 21, 2005

Respectfully submitted,

WINE & SPIRITS RETAILERS, INC., *et al.*

By their Attorneys,

/s/ Michael Williams
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WINE & SPIRITS RETAILERS, INC., *et al.* *Plaintiffs,* *v.* STATE OF RHODE ISLAND *et al.*, *Defendants.*	Civil Action No. 04-418-T

CERTIFICATE OF SERVICE

The undersigned attorney for the Plaintiffs hereby certifies that true copies of the *Amended Complaint* were served upon the following attorneys of record by United

States first class mail, postage prepaid on this 21st day of December, 2005:

Rebecca Partington
Deputy Chief– Civil Division
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/s/ Michael Williams
Michael Williams (*pro hac vice*)

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS DEPARTMENT OF BUSINESS REGULATION 233 RICHMOND STREET PROVIDENCE, RI 02903

IN THE MATTER OF:	:	
People's Liquor Warehouse-Hopkinton, Inc. d/b/a People's Liquor Warehouse,	:	**DBR No. 06-L-007**
RESPONDENT.	:	

IN THE MATTER OF:	:	
People's Liquor Warehouse-Apponaug, Inc. d/b/a People's Liquor Warehouse,	:	**DBR No. 06-L-008**
RESPONDENT.	:	

IN THE MATTER OF:	:	
People's Liquor Warehouse of Cranston LLC d/b/a People's Liquor Warehouse,	:	**DBR No. 06-L-009**
RESPONDENT.	:	

IN THE MATTER OF: **MAB Liquors, Ltd. d/b/a Douglas Wine & Spirits-Cranston,** **RESPONDENT.**	**DBR No. 06-L-010**

IN THE MATTER OF: **Delta Wine & Spirits, Inc. d/b/a Douglas Wine & Spirits-Smith St.** **RESPONDENT.**	**DBR No. 06-L-011**

IN THE MATTER OF: **Douglas Liquors, Inc. d/b/a Douglas Wine & Spirits-No. Providence, Inc.,** **RESPONDENT.**	**DBR No. 06-L-012**

IN THE MATTER OF: **Liquor Depot East Providence, Inc. d/b/a Douglas Wine & Spirits-East Providence, Inc.,** **RESPONDENT.**	**DBR No. 06-L-013**

IN THE MATTER OF: **No. Smithfield Wine & Spirits, Inc. d/b/a Douglas Wine & Spirits-North Smithfield, Inc.,** **RESPONDENT.**	**DBR No. 06-L-014**

IN THE MATTER OF: **CSW Operating Company d/b/a Douglas Wine & Spirits-Cumberland,** **RESPONDENT.**	**DBR No. 06-L-015**

IN THE MATTER OF: **Putnam Pike Liquors, Inc. d/b/a Douglas Wine & Spirits-44,** **RESPONDENT.**	**DBR No. 06-L-016**

IN THE MATTER OF: **Knights Wine & Spirits Inc. d/b/a Douglas Wine & Spirits-Johnston, Inc.,** **RESPONDENT.**	**DBR No. 06-L-017**

DECISION

I. INTRODUCTION

In 2004, the Rhode Island General Assembly amended R.I. Gen. Laws § 3-5-11 and enacted R.I. Gen. Laws § 3-5-11.1. R.I. Gen. Laws § 3-5-11.1, effective on April 1, 2005, prohibited the Department of Business Regulation ("Department") from granting, issuing, renewing, and/or transferring Class A liquor licenses[1] to or for the use of any liquor franchisor or franchisee. R.I. Gen. Laws § 3-5-11(a), also effective on April 1, 2005, prohibited the Department from granting, issuing, or transferring Class A liquor licenses to or for the use of any "chain store organization." R.I. Gen. Laws § 3-5-11(b)(1)(vi) defines "chain store organization" as:

> [a]ny group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly or have any direct or indirect beneficial interest in the following practices:
>
> . . .
>
> (vi) [a]ny term or name identified as a chain or common entity.

On January 6, 2006 the Director of the Department issued separate Orders to Show Cause, Notice of Hearing, and Appointment of Hearing Officer ("Order to Show Cause" attached as Exhibit 1) to each of the above-captioned Respondents for operating as a "chain store

[1] All of the Respondents in this matter are Class A liquor licensees pursuant to R.I. Gen. Laws § 3-7-3.

organization" in violation of R.I. Gen. Laws § 3-5-11 due to the use of a "same or materially similar name as another Class A licensee" (see Order to Show Cause, paragraph 5) as defined in R.I. Gen. Laws § 3-5-11(b)(1)(vi). The Orders to Show Cause allege that the above-captioned Respondents failed to comply with two (2) Departmental Bulletins dated September 21, 2005 (attached as Exhibit 2) and December 15, 2005 (attached as Exhibit 3) issued to all Class A liquor licensees explaining and informing the affected licensees regarding the prohibition of Class A licensees from using the same or materially similar names. Paragraph 4 of the September 21, 2005 Bulletin directed all of the Respondents to submit and obtain approval for a name dissimilar than other Class A licensees by December 31, 2005 in order to comply with R.I. Gen. Laws § 3-5-11(b)(1)(vi). The Department alleges in its Orders to Show Cause that Respondents have violated a directive of the Department and are engaged in a business practice prohibited by R.I. Gen. Laws § 3-5-11 and therefore, requests that pursuant to R.I. Gen. Laws § 3-5-11(b)(4) Respondents' licenses be revoked, or alternatively, the licensees be ordered to cease and desist from the prohibited practices and that a fine be imposed for the violation.

A pre-hearing conference on the Orders to Show Cause was held on February 16, 2006. At that time, counsel for the Department and the Respondents agreed to consolidate the above-captioned matters. On March 20, 2006, the Department filed a Motion and Memorandum of Law in Support of its Motion for Summary Judgment. On April 28, 2006, the Respondents filed their Memorandum in Support of their Opposition to the Department's Motion for Summary Judgment and their Cross-Motion for Summary

Judgment. On May 10, 2006, the Respondents submitted a supplemental letter and case in support of their Objection and Cross-Motion for Summary Judgment. On May 18, 2006, a status conference was held to determine whether the Department wanted to reply to Respondents' Objection and Cross-Motion for Summary Judgment. The Department did not reply in writing to Respondents' Objection and Cross-Motion for Summary Judgment and the parties requested that a Decision on the pleadings be issued.

It should also be noted that the undersigned Hearing Officer is also adjudicating another matter involving the same Respondents in a consolidated matter, DBR Numbers 05-L-0225 through to and including 05-L-0232, which addresses whether or not the Respondents are violating the other prohibited activities in R.I. Gen. Laws § 3-5-11(b)(1) and (2) other than R.I. Gen. Laws § 3-5-11(b)(1)(vi) (the bar against any term or name identified as a chain or common entity).

Additionally, the Wine and Spirits Retailers Inc. and John Haronian (referred to collectively as "W&S") filed a civil action on September 28, 2004 in the United States District Court for the District of Rhode Island against the State of Rhode Island and the Department seeking to declare R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 unconstitutional and enjoin the enforcement of the statutes by the Department. *See Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island and Providence Plantations and Jeffrey J. Greer, in his capacity as Associate Director of the Rhode Island Department of Business Regulation,* 364 F. Supp. 2d 172, 175 (D. R.I. 2005). W&S is the franchisor with whom the Respondents in this matter have a franchisee agreement under the name Douglas Wine & Spirits. The United States District Court

for the District of Rhode Island denied W&S's motion for a preliminary injunction. *Id.* at 183. W&S appealed the federal District Court's denial of its motion for a preliminary injunction to the United States Court of Appeals for the First Circuit and on August 10, 2005, said court affirmed the District Court's denial of the motion for preliminary injunction. *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island and Providence Plantations and Jeffrey J. Greer, in his capacity as Associate Director of the Rhode Island Department of Business Regulation*, 418 F.3d 36, 2005 (1st Cir.).

II. JURISDICTION

The Department has jurisdiction over the Respondents as Class A liquor licensees pursuant to R.I. Gen. Laws §§ 3-5-1 *et seq.* and 3-7-1 *et seq.*

IV. [sic] ISSUE

The issue in this matter is whether Respondents' use of the term or names as stipulated constitutes prohibited operation as a "chain store organization" as defined in R.I. Gen. Laws § 3-5-11(b)(1)(vi). If it is deemed to be a violation, the Hearing Officer must then determine an appropriate remedy for the violation of R.I. Gen. Laws § 3-5-11 pursuant to R.I. Gen. Laws § 3-5-11(b)(4).

V. UNDISPUTED FACTS

The Department and Respondents agree that:

A. R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 were amended and enacted, respectively, in 2004, and were effective as of April 1, 2005.

B. On September 21, 2005 the Department issued Bulletin 2005-2 to all Class A Licensees and Wholesalers. This Bulletin clarified four (4) questions relating to the types of practices prohibited by the amendment and enactment of R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 and informed Class A licensees that the statutory changes eliminate any chain store and alcoholic beverage franchisor/franchisee relationships. The Bulletin specifically stated that it was "not meant to be an exhaustive list of prohibited practices as set forth in the law, but rather will serve to provide an overview of certain prohibited practices for which enforcement action will be taken."

C. Bulletin 2005-2 stated that the following practice is prohibited:

> [E]xistence of Class A licensees with the same or materially same names. By April 1, 2006, each retail licensee will be required to operate under a name totally dissimilar from other Class A licensees with the exception that a full proper legal name may be used as a business name. For example, if there is more than one licensee operating under the name "Smith's Liquors" the same name should be changed to a totally dissimilar name or, if the owner is named Smith, the name may be changed to the full Legal name of the owner such as "Joe Smith's Liquors," to demonstrate appropriate differentiation. Accordingly, two (2) or more stores currently named in a manner such as "Hank's Liquors of Smithfield" and "Hank's Liquors of Newport" will not be considered a sufficient differentiation of name . . . The Department encourages all licensees to call with any further questions they may have about operating under R.I. Gen. Laws § 3-5-11 and 11.1.

D. From October 25, 2005 to October 31, 2005, the Respondents proceeded to change their "full proper legal name" with the Secretary of State's office:

1. from PLW-Hopkinton, Inc. to Peoples Liquor Warehouse-Hopkinton, Inc.

2. from Douglas Wine & Spirits Apponaug, Inc. to Peoples Liquor Warehouse-Apponaug, Inc.

3. from PLW Cranston, LLC to Peoples Liquors Warehosue [sic?] of Cranston, Inc.

4. from MAB Liquors, Ltd. To Douglas Wine & Spirits-Cranston, Inc.

5. from Delta Wine & Spirits, Inc. to Douglas Wine & Spirits-Smith Street, Inc.

6. from Douglas Liquors, Inc. to Douglas Wine & Spirits No. Providence, Inc.

7. from Liquor Depot East Providence, Inc. to Douglas Wine & Spirits-East Providence, Inc.

8. from No. Smithfield Wine & Spirits, Inc. to Douglas Wine & Spirits- No. Smithfield, Inc.

9. from CWS Operating Company to Douglas Wine & Spirits-Cumberland, Inc.

10. from Putnam Pike Liquors, Inc. to Douglas Wine & Spirits-44 Inc.

11. from Knights Wine and Spirits, Inc. to Douglas Wine and Spirits Johnston, Inc.

E. On November 17, 2005 the Respondents provided the Department with their name change Certificates issued by the office of the Rhode Island Secretary of State.

F. On December 15, 2005, the Department amended paragraph 4 of Bulletin 2005-2 to clarify additional criteria that do not deem a name "distinguishable" from another name. In that clarification, the Department stated that one of the criteria that would not be considered to distinguish the use of similar names is the addition of a geographic location or place, or a numeric designation (for example, Gourmet Liquors Inc. versus Gourmet Liquors of Providence, Inc. or Gourmet Liquors I, Inc. versus Gourmet Liquors II, Inc.).

G. On December 28, 2005 the Respondents resubmitted their same name changes as described in paragraph V (D) above to the Department.

H. On December 29, 2005, the Department rejected the Respondents' names.

VI. DISCUSSION

A. Summary Judgment Standard

Under Rule 56 of the Superior Court Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, it is necessary to view the evidence in the light most favorable to the nonmoving party. *Hefline v. Koszela,* 774 A.2d 25, 29 (R.I. 2001). Summary judgment is appropriate if there are no genuine issues of material fact remaining and the moving party is

entitled to judgment as a matter of law. *See Id.* The moving party bears the initial burden of demonstrating the absence of questions of material fact. *See Id.* That burden *may be satisfied by "submitting evidentiary materials*, such as interrogatory answers, deposition, testimony, admissions, or other specific documents, and/or pointing to the absence of such items in the evidence adduced by the parties." *Id.* (quoting *Doe v. Gelineau,* 732 A.2d 43, 48 (R.I. 1999)). In this matter, the parties have stipulated to the facts and it is clear that there are no material facts in dispute regarding the names submitted by the Respondents.

B. Department's Motion for Summary Judgment

The Department asserts that the clear and unambiguous language of R.I. Gen. Laws § 3-5-11(b)(I)(vi) prohibits the Respondents from using any term or name identified as a chain or common entity. The Department further asserts that the names as currently being used by Respondents constitute names evidencing a chain or common entity. The Department states that well-established principles of administrative law require that the Department be afforded deference in its administration and enforcement of the statute at issue. The Department further asserts that its guidelines regarding the use of names are reasonable and intended to enforce the statutory mandates in R.I. Gen. Laws § 3-5-11(b)(1)(vi) and because Respondents are clearly in violation of the Department's guidelines as articulated in Bulletin 2005-2 and its amendment, the Respondents' licenses should be revoked or alternatively, a cease and desist order shall be issued to the Respondents to prevent them from using

materially similar names as well as a fine not to exceed $10,000 per licensee pursuant to R.I. Gen. Laws § 3-5-I1(b)(4).

C. Respondents' Objection and Cross-Motion for Summary Judgment

The Respondents assert that the Department's interpretation and application of R.I. Gen. Laws § 3-5-11 should be quashed because: (i) the Department has abused its discretion; (ii) the Department's interpretation and application violates the Respondents' First Amendment right to freedom of speech; (iii) there are less drastic means available to achieve compliance with the statute; and (iv) the Department's interpretation and application violates the Respondents' Fifth Amendment rights because it is an illegal taking. Additionally, Respondents claim that the entire statutory scheme that governs R.I. Gen. Laws § 3-5-11 violates the Commerce Clause because it impermissibly burdens interstate commerce and violates the Sherman Anti-Trust Act because it illegally restrains trade and, therefore, prevents competition, which harms consumers. Therefore, Respondents allege that any order against Respondents to cease and desist the use of the Respondents' names would violate the Respondents' rights.

Respondents stress that the reason the Department must not be afforded deference in its interpretation of the statute at issue is because the interpretation violates the Constitution and the statute itself is unconstitutional because it infringes upon the First Amendment rights of the Respondents. The Respondents state that the Department is compounding the constitutional issues by misinterpreting the statute and abusing its discretion and

authority in the enforcement of the statute. Respondents maintain that the statute does not articulate the harm associated with from the existence and/or perception of a chain store organization. However, Respondents assume for the purpose of argument that the only harm sought to be avoided is the *misimpression* that a licensee is a chain store or affiliated with another store, and offer other methodology for enforcing the statute. Furthermore, Respondents assert that because the Department would allow the use of the full, legal name of the individual owner associated with the name of the licensee, the Department is acting arbitrarily in its application. That is, under the current criteria, the Department would allow the use of Kathleen Haronian's Douglas Wine & Spirits-North Providence, Inc. but not Douglas Wine & Spirits-North Providence. The Respondents allege that there is no difference in the two names. Therefore, the Respondents allege the criteria used by the Department to enforce the statute are arbitrary.

Respondents raise constitutionality of the statutes at issue based on violations of Respondents' First Amendment right to freedom of speech, the Fifth Amendment, the Commerce Clause and the Sherman Anti-trust Act, and the Equal Protection Cause. This Decision will discuss legislative intent, statutory construction, and the mandates imposed upon this administrative agency (part of the Executive Branch of government) without infringing upon the determination of constitutionality of statutes which lies solely within the Judicial Branch of government and is well outside the purview of this administrative agency. Additionally, it does not serve judicial economy nor further the purpose of administrative regulation – to enforce statutory mandates – to have an administrative agency

rule on the constitutionality of statutes which it is charged with enforcing. This is especially true in the context of this proceeding because the challenge to the constitutionality of the statutes at issue commenced in Federal District Court prior to this adjudication and is currently pending in federal District Court (and is scheduled to go to trial in June 2006). The Rhode Island Supreme Court has stated that:

> [t]he principle that protects an administrative agency from constitutional challenges during the course of a licensing or permit proceeding is based upon the necessity to establish and maintain orderly procedures required for effective implementation of administrative determinations pursuant to § 42-35-15, that review is circumscribed and limited to determinations that the agency itself might properly entertain and consider.

See Easton's Point Association et al. v. Coastal Resources Management Council et al., 522 A.2d 199, 202 (R.I. 1987).

D. Statutory Construction/Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining the statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047, 1049 (R.I. 1994). See *Parkway Towers Associates v. Godfrey,* 688 A.2d 1289 (R.I. 1997). The Rhode Island Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management,* 553 A.2d 541 (R.I. 1989) (citing *Cocchini v.*

City of Providence, 479 A.2d 108, 111 (R.I. 1984); *Beaudoin v. Petit* 409 A.2d 536, 540 (1979); *Raymond Construction Co. v. Bisbano,* 326 A.2d 858, 861 (1974)). In cases where statutory language is ambiguous, the Rhode Island Supreme Court has consistently held that legislative intent must be considered. *Providence Journal Co. v. Rodgers,* 711 A.2d 1131, 1134 (R.I. 1998). The statutory provisions must be examined in their entirety and the meaning most consistent with the policies and purposes of the legislature must be effectuated. *Id.* It is also necessary to take into account the scope of the statute and the purpose sought to be accomplished through the enactment of the statute when determining how it is to be construed. *New England Die Co., Inc. v. General Products Co., Inc.,* 168 A.2d 150 (R.I. 1961).

In examining Title 3 of the Rhode Island General Laws, entitled Alcoholic Beverages, it is clear that the legislature intended to regulate many facets of the liquor industry. The chapters of Title 3 of the Rhode Island General Laws include such areas as: Chapter 4-Transportation of Beverages: Chapter 5-Licenses (including state and local licensing provisions, limitations on the number of licenses, manufacturer and wholesaler licenses); Chapter 6-Manufacturing and Wholesale Licenses; Chapter 7-Retail Licenses; Chapter 8- Regulation of Sales; Chapter 9-Adulterated Liquors; Chapter 10-Taxation of Beverages; Chapters 11 and 12-Penalties and Liabilities and Enforcement of Title; Chapter 13-Malt Beverage Supplier-Wholesaler Agreements; and Chapter 14- The Rhode Island Liquor Liability Act. This comprehensive statutory scheme clearly reflects the legislative intent to control, regulate, penalize, and monitor activities related to liquor. Additionally, R.I. Gen. Laws § 3-1-5

states that "[t]his title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." R.I. Gen. Laws § 3-2-2 also gives the Department "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and *selling beverages*." (Emphasis added). This authority supervision ties into the Department's regulation in R.I. Gen. Laws § 3-5-1 *et seq.*, entitled Licenses Generally, because the licenses are required for manufacture, sale or importation of beverages (R.I. Gen. Laws § 3-5-1).

The purpose and scope of the statute at issue, R.I. Gen. Laws § 3-5-11(b)(1)(vi) and R.I. Gen. Laws § 3-5-11.1 (prohibiting liquor franchises) must, therefore, be analyzed in the context of this statutory scheme. R.I. Gen. Laws § 3-5-11.1 states that the purpose of the liquor franchise prohibition is to "promote the effective and reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." The statutory definition of "chain store organization," and its criteria in R.I. Gen. Laws § 3-5-11(b)(1)(vi) is clear, unambiguous criteria established by the legislature requiring the Department to regulate the sale of liquor by certain licensees in a certain manner-by limiting the term or name identified as a chain or common entity.

The Rhode Island Supreme Court has consistently upheld the Department's authority to regulate the liquor industry. It has long been established that the role of the Liquor Control Administrator (subsequently replaced by the Department) in Rhode Island is that of a "superlicensing board" with a broad and comprehensive power of

review. *Hallene v. Smith,* 201 A.2d 921, 924 (R.I. 1964) (de novo review necessary to fulfill intention of Legislature to "provide broad and comprehensive control by the State over the liquor traffic and to vest that control in an administrative body"); *Tedford et al v. Reynolds,* 141 A.2d 264, 267 (R.I. 1958); *Baginski v. Alcoholic Beverage Commission,* 4 A. 2d 265, 268 (R.I. 1939); *see Clark v. Alcoholic Beverage Commission,* 170 A. 79, 80 (R.I. 1934). This authority derives in part from the general supervisory authority in matters related to liquor licensing that is vested in the Department through R.I. Gen. Laws § 3-2-2, which states that "the department has general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." Further evidencing the wide powers of supervision and regulation vested in the Department and the scope of Department's authority is R.I. Gen. Laws § 3-1-5 which provides: "this title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." See *Thompson v. Town of East Greenwich,* 512 A.2d 837, 842 (R.I. 1986). The seminal cases in the area of describing the purpose, scope and necessity of liquor regulation by the Department are *Baginski, Clark,* and *Standard Bottling Company v. Brewster,* 65 R.I. 279 (1940). These post-prohibition cases recognize the well-established need to address the pre-prohibition system of regulation which was an "unsupervised system of local regulation" and a "lack of uniformity" in administering the law, resulting in "grave abuses which, as a matter of common knowledge, seriously affected public welfare." *Baginski* at 181. The Rhode Island Supreme Court has stated that the legislature expressly

provided for state control and has adopted a system for administering such control in a manner which it deems the most likely to be productive of the public good. *Bd. of License Commissioners v. Daneker,* 78 R.I. 101, 107 (R.I. 1951). It should be noted that the Rhode Island Supreme Court has also recognized the Department's ability to review cases on its own initiative pursuant to R.I. Gen. Laws §§ 3-5-21 and 23.

The purpose of prohibitions set forth in R.I. Gen. Laws §§ 3-5-11 and 3-5-11.1 is to create uniformity and consistency in the sales, advertising, supervision, and control of conduct of the business of selling alcohol beverages consistent with the evident purposes of Title 3 of the Rhode Island General Laws in its entirety and R.I. Gen. Laws §§ 3-1-5 and 3-5-11.1. Therefore, the Department is granted clear, unambiguous statutory mandates requiring it to determine whether Class A liquor licensees are operating as a "chain store organization" by using a term or name identified as a chain or common entity and determine an appropriate penalty for such prohibited activity.

E. Department's Interpretation and Application of Statute

The Department's interpretation of R.I. Gen. Laws § 3-5-11 is not an abuse of discretion and is not selectively applied to Respondents.[2] The Department's interpretation

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[2] The federal District Court stated in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al.,* at 174-175 that "[s]ince 1933, Rhode Island, like many other states, has statutorily prohibited the retail sale of alcoholic beverages by 'chain store organizations.' (*citing* R.I. Gen. Laws § 3-5-11 and referencing *see Granite*

(Continued on following page)

as reflected in Bulletin 2005-2 and its December 15, 2005 amendment clearly sets forth guidelines to allow entities and individuals to distinguish their names to minimize the use of a chain or common entity. The Department clearly stated in its September 21, 2005 Bulletin that the adding of a location to an existing similar name would not be considered a sufficient differentiation of name. However, in defiance of that mandate, the Respondents proceeded to change their names to make them *more* similar to one another by adding locations to the same names-Peoples Liquor Warehouse and Douglas Wine & Spirits. Then, in an act of further disingenuousness, they proceeded to assert that they thought paragraph 4 of Bulletin 2005-2 allowed the use of a "full proper legal name" even though the context of the example set forth in that paragraph was inconsistent with the Respondents' interpretation. The Department clearly intended to apply the "full proper legal name" standard to the name of an individual as opposed the name of a business entity. It is clear from the result of the Respondents' name changes (to make the names more similar) that it was an unreasonable interpretation by Respondents.

The criteria enunciated in the Department's Bulletins clearly sought to inform its licensees and assist them in the enforcement of the statutory mandate while recognizing that some of the licensees had a personal stake in their businesses. For that reason, it is reasonable that the Department allowed the "full proper legal name" of individuals

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State Grocers Ass'n v. State Liquor Comm'n, 112 N.H. 62, 289 A.2d 399, 402 (N.H. 1972) (observing that at least twenty states, plus New Hampshire, restrict the number of alcoholic beverage permits that may be held by a single person or group.)

to be attached to the name of the licensee. Furthermore, the use of individual names clearly ties the license to an individual separate and apart from a business entity which is consistent with the requirement in R.I. Gen. Laws § 3-5-1(b)(1)(vi). That is, a business entity name (without reference to an individual's full proper name) is more likely to be deemed a chain or common entity. The Respondents' current names clearly exemplify the exact rationale for requiring distinguishable names in order to prevent the misperception of a chain store or common entity. The names currently used by Respondents are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi).

F. Allegations Regarding Unconstitutionality of the Department's Interpretation/Application

Respondents assert that because the First Amendment protects Respondents' trade names as speech, the Department's attempt to revoke the Respondents' trade name infringes upon the Respondents' right to freedom of speech. Therefore, Respondents argue R.I. Gen. Laws § 3-5-11(b)(1)(vi) prohibits the Respondents' trade names in violation of the First Amendment. While it is clear that this administrative agency does not have the authority to adjudicate the constitutionality of statutes, it is compelled to address Respondents' constitutional claims because they have been raised as issues prohibiting the enforcement of R.I. Gen. Laws § 3-5-11(b)(1)(vi). Respondents assert that because their trade names convey more information to the potential consumer than the source of the products sold, the restriction on the trade name constitute an infringement on *pure* speech which should be afforded higher

standard of scrutiny than an infringement on commercial speech. Respondents assert that their trade names convey reputation for quality, price and service associated with the name "Douglas Wine & Spirits" and "Peoples Liquor Warehouse;" therefore, the infringement is upon pure speech. The alleged conveyance of quality, price, and service through the trade names at issue are impossible to meaningfully establish in this context.

Assuming *arguendo* that the statute is subject to the analysis articulated in *Central Hudson Gas & Electric Corp v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), it is clear that under the analysis set forth in Section V (D) above, the statute and the Department's application of the statute meet the *Central Hudson* Test:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. As stated in Sections V (D), the prohibition of franchises is lawful activity and clearly not misleading, and the governmental interest in the regulation of alcoholic beverages generally, and Class A licensees specifically is statutorily mandated and supported by well-established caselaw. Therefore, it clearly advances governmental interests and the restrictions on chain store

organizations as applied by the Department is clearly intended to advance the goals to create uniformity and consistency in the sales, advertising, supervision, and control of conduct of the business of selling alcohol beverages consistent with the evident purposes of Title 3 of the Rhode Island General Laws in its entirety and R.I. Gen. Laws §§ 3-1-5 and 3-5-11.1 specifically. The restriction on the use of similar names clearly furthers the statutory purpose of prohibiting chain store organizations. The names as used by Respondents clearly convey a chain or common entity which is expressly prohibited by R.I. Gen. Laws §§ 3-5-11(b)(1)(vi) and 3-5-11.1.

The undersigned also rejects Respondents assertion that the Department's interpretation of R.I. Gen. Laws § 3-5-11 and rejection of the Respondents' trade names must fail because less dramatic means are available. Respondents suggest that the Department allow the phrase "independently owned and operated" to follow Respondents' names on their signs. The Department has rejected this additional phrase because it still conveys the connection or affiliation of entities. Alternatively, Respondents suggest that they be afforded the opportunity to add the phrase that reads "Not a chain store." It is clear that allowing Respondents to have similar names with qualifying phrases does not fully distinguish the entities in a meaningful way. Furthermore, even if entities are designated to be "independently owned and operated" and/or "not a chain store," the presence of any similar term or name identified as a chain or common entity among entities sends mixed messages to the consumer and is not a reasonable application of that prohibition.

Finally, Respondents assert that R.I. Gen. Laws § 3-5-11(b)(1)(vi) violates the Commerce Clause, the Sherman

Anti-Trust Act, and the Equal Protection Clause. For the reasons stated herein regarding the purpose of the statute within the context of the Department's authority to regulate such activity, it is well within the authority of this agency to interpret and apply the statute as described in this matter. The Respondents have not set forth sufficient facts to sustain their allegations of violations of the Commerce Clause, the Sherman Anti-Trust Act and the Equal Protection Act. Specifically, it is not clear how requiring Respondents to change their name burdens interstate commerce and discriminates against out-of-state commerce because all licensees will be subject to the same criteria. With respect to the Sherman Anti-Trust Act allegations, it is not clear what empirical evidence is being used to support Respondents' conclusions. The Equal Protection Clause violations also are not supported by the facts in this matter. It is clear that the statutory prohibition of a term or name identified as a chain or common entity serves a legitimate governmental interest as decided by the General Assembly in prohibiting chain store organizations as set forth herein.

G. Administrative Penalty

Respondents have been afforded ample opportunity to comply with the statutory mandates of R.I. Gen. Laws § 3-11-5(b)(1)(vi) and have deliberately chosen, not only to refuse to comply, but have taken the additional measure of using names that are more indicative of a chain or common entity than prior to the issuance of the Department's Bulletins. It is reasonable to allow licensees the benefit of due process to challenge statutory mandates within the paradigm of the administrative process; but Respondents' actions in this matter clearly evidence not a reasonable

availing of the administrative process, but a desire to intentionally violate a clear statutory mandate. It is one thing for the licensees to continue to operate under their former licensed names, but in this matter, Respondents proceeded to change their names to reflect a more compelling example of a chain or common entity. Their explanations regarding using "full proper legal name" ignores the context of the Bulletin and does not demonstrate a good-faith effort to undertake an administrative adjudication to seek relief from statutory mandates but to calculatingly flout the mandate by more egregiously violating it while feigning attempted compliance. Respondents' actions in this matter do not demonstrate the requisite "suitability" qualification required of licensees pursuant to R.I. Gen. Laws § 3-5-10.

It is also troubling that the federal District Court's April 8, 2005 decision in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 seemingly confirms that Respondents are currently franchisees in violation of R.I. Gen. Laws §§ 3-5-11 and 11.1:

> [a]pproximately seven years ago, W&S, which itself does not hold a Class A license, began enlisting independently-owned liquor stores to operate as its franchisees under the name Douglas Wine & Spirits. The terms of the franchise arrangement are set forth in the Uniform Franchise Offering Circular filed by Wine & Spirits with the Department of Business Regulation and in W&S's standard franchise agreement. Those terms include provisions that authorize W&S to designate geographical territory in which the franchisee may operate; the inventory items that the franchisee is allowed or required to carry; the vendors from which the franchisee may purchase

> those items; and the layout of the franchisee's store. The franchisee is required to pay an annual franchise fee and to contribute to an advertising and promotion fund controlled by W&S. In exchange, W&S agrees to grant the franchisee exclusive franchise rights within the assigned territory; to help the franchisee train its employees; and to advise the franchisee with respect to advertising, marketing, and other aspects of the franchisees business.

The undersigned Hearing Officer takes notice pursuant to Rule 201 of the Rhode Island Rules of Evidence of the facts stated in April 8, 2005 decision of the federal District Court and is compelled to address the violation as described above. If the Respondents are a party to a franchise agreement, said agreements are declared null and void and illegal as of the effective date of R.I. Gen. Laws § 3-5-11.1, April 1, 2005, and shall be terminated by the franchisor or the franchisee within thirty (30) days of the effective date of this section pursuant to R.I. Gen. Laws § 3-5-11.1(c). Furthermore, upon finding of a violation of R.I. Gen. Laws § 3-5-11.1 by either the franchisor or the licensee, the Department is empowered to set a fine up to the amount of ten thousand dollars ($10,000) per violating franchisor or licensee, revoke the license of the violator or suspend the license of the violator for a period of time to be determined by the Department pursuant to R.I. Gen. Laws § 3-5-11.1(d). R.I. Gen. Laws § 3-5-11.1(d) also gives the Department the power to revoke or suspend the franchise registration in accordance with R.I. Gen. Laws 19-28.1-18 and to order it to cease and desist from all operations that are violative of the provisions of this section. The undersigned would be remiss if she did not address the facts stated in the federal District Court

decision regarding the apparent violation of R.I. Gen. Laws § 3-5-11.1. Therefore, since a violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi) has already been determined, it is necessary within the context of this proceeding to inquire further about the apparent violations of R.I. Gen. Laws § 3-5-11.1 in order to craft an effective, meaningful remedy. Additionally, regardless of whether the franchise agreements are still in place, the dissolution of the violating chain store entities pursuant to R.I. Gen. Laws § 3-5-11(b)(4) is a remedy that is provided to the Department and effectively cures the violation, better serves the interests of the Respondents (rather than the revocation of the license as requested by the Department) and enforcement of these specific statutory mandates. Furthermore, it is clear from the language of R.I. Gen. Laws § 3-5-11(b)(1) that only one practice of the six (6) listed have to [sic] established in order to adjudicate an entity a "chain store organization." Therefore, it is the undersigned's recommendation that because R.I. Gen. Laws § 3-5-11(b)(4) authorizes the Department to "order the dissolution of the violating chain store entity(s)," it is appropriate to order such dissolution in order to effectuate the statutory mandate of prohibiting chain store organizations, and franchises. For these reasons, the undersigned Hearing Officer recommends that Respondents be ordered to:

1. Pay an administrative penalty of $5,000 per Respondent;

2. Suspend their licenses for a period of ten (10) business days;

3. During the ten (10) day suspension, Respondents shall seek the approval of name change from the Department and cease and desist from conducting any licensed activity

until such time that the Department approves the use of a name for each Respondent.

4. Confirm within ten (10) business days of this Decision whether the facts stated in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 regarding existing franchise agreements are still true. If said facts are true, and the Respondents are parties to franchise agreements, said franchise agreements are deemed null and void and illegal pursuant to R.I. Gen. Laws § 3-5-11.1(b) and the undersigned further orders the dissolution of the violating Respondents as chain store entities pursuant to R.I. Gen. Laws §§ 3-5-11(b)(4) and 3-5-11.1(d).

5. Appear before the undersigned on June 29, 2006 at 10:00 am for a status conference related to the status of Respondents' compliance with the terms of this Decision and the process to be utilized to dissolve the chain store entities.

6. The Department may move for additional remedies if the facts pertaining to the status of Respondents' franchise agreements so warrant. Respondents shall be afforded notice and an opportunity to object to said remedies.

VII. FINDINGS OF FACT

A. The undisputed facts as stated in Section V of this Decision are incorporated by reference as findings of fact herein.

B. The undersigned Hearing Officer takes administrative notice of the fact that Respondents may be a party to a franchise agreement based on the decision of the federal District Court in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175.

VIII. CONCLUSIONS OF LAW

A. Respondents' use of their names as proposed to the Department and described in Section V herein constitutes the use of terms or names identified as a chain or common entity and therefore establish a "chain store organization" under R.I. Gen. Laws § 3-5-11(b)(1)(vi).

B. Respondents' use of their names as proposed to the Department and described in Section V herein is a violation of R.I. Gen. Laws § 3-5-11(a).

C. The undersigned Hearing Officer takes quasi-judicial notice of *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 pursuant to Rule 201 of the Rhode Island Rules of Evidence.

D. The existence of franchise agreements as described in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 may, if still in existence, constitute a violation of R.I. Gen. Laws § 3-5-11.1.

E. Respondents' violations of R.I. Gen. Laws § 3-5-11 warrant the imposition of administrative penalties pursuant to R.I. Gen. Laws §§ 3-5-11(b)(4) including suspension, a cease and desist order, an administrative penalty, and the dissolution of the chain store organizations.

F. The existence of franchise agreements in which Respondents are parties may constitute a violation of R.I. Gen. Laws § 3-5-11.1 and warrant further inquiry by this Hearing Officer in order to craft an effective, meaningful remedy pursuant to R.I. Gen. Laws § 3-5-11(b)(4) and 3-5-11.1(d).

G. The dissolution of the chain store entities pursuant to R.I. Gen. Laws § 3-5-11(b)(4) is a more effective remedy for the violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi) than the revocation of licenses sought by the Department.

H. As part of the Department's remedy to dissolve the chain store entities, it is necessary to give the opportunity to be heard to aid in the effective dissolution of the chain store entities.

IX. RECOMMENDATION

For the reasons stated herein, the undersigned Hearing Officer respectfully recommends that the Department's Motion for Summary Judgment be granted and the Respondents' Cross-Motion for Summary Judgment be denied. The undersigned Hearing Officer also recommends that the Respondents be ordered to:

A. Pay an administrative penalty of $5,000 per Respondent;

B. Suspend their licenses for a period of ten (10) business days;

C. During the ten (10) business day suspension, Respondents shall seek the approval of name change from the Department and cease and desist from conducting any licensed activity until such time

that the Department approves the use of a name for each Respondent.

D. Confirm, in writing, to the Department within ten (10) business days of this Decision whether the facts stated in *Wine and Spirits Retailers Inc. and John Haronian v. State of Rhode Island et al* at 175 regarding existing franchise agreements are still true. If said facts are true, and the Respondents are parties to franchise agreements, said franchise agreements are deemed null and void and illegal pursuant to R.I. Gen. Laws § 3-5-11.1(b) and the undersigned further orders the dissolution of the violating Respondents as chain store entities pursuant to R.I. Gen. Laws §§ 3-5-11(b)(4) and 3-5-11.1(d).

E. Appear before the undersigned on June 29, 2006 at 10:00 am for a status conference related to the status of Respondents' compliance with the terms of this Decision and the process to be utilized to dissolve the chain store entities.

F. The Department may move for additional remedies if the facts pertaining to the status of Respondents' franchise agreements so warrant. Respondents shall be afforded notice and an opportunity to object to said remedies.

Dated May 24, 2006 /s/ Neena Sinha Savage
Neena Sinha Savage, Esq.
Hearing Officer

ORDER

I have read the Hearing Officer's Recommendation in this matter, and I hereby take the following action with regard to the Recommendation:

✓ ADOPT
___ REJECT
___ MODIFY

Dated: 5/24/2006

/s/ A. Michael Marques
A. Michael Marques
Director

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify that on this 25th day of May, 2006, a copy of this Decision was sent by first class and certified mail, postage prepaid to

Robert J. Roughsedge, Esq.
Lawson & Weitzen, LLP
88 Black Falcon Avenue
Suite 345
Boston, MA 02210-1736

and by hand-delivery to:

Michael Jolin, Esq.
Deputy Chief of Legal Services
233 Richmond Street
Providence, RI 02903

/s/ A B Ellison

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

Filed May 21, 2007

PROVIDENCE, SC.		**SUPERIOR COURT**
PEOPLES LIQUOR WAREHOUSE – HOPKINTON, INC., *et al.*	:	
v.	:	**CA. No. PC-2006-3223**
DEPARTMENT OF BUSINESS REGULATION	:	

DECISION

CLIFTON, J. The Appellants, eleven Rhode Island-based package stores holding Class A liquor licenses, appeal a Rhode Island Department of Business Regulation ("DBR") decision granting summary judgment in favor of the DBR. A DBR Hearing Officer determined that the Appellants' use of essentially the same business name violates G.L. 1956 § 3-5-11(b)(1)(vi), which prohibits licensees from using "[a]ny term or name identified as a chain or common entity." The Hearing Officer found that the Appellants' business names identified them as a chain or common entity in violation of G.L. 1956 § 3-5-11(a) and ordered the Appellants to pay an administrative penalty of $5,000 each and suspended their licenses for a period of ten (10) business days. The Hearing Officer further required Appellants to seek DBR approval of any business name changes and to cease and desist from conducting any licensed activity until the DBR approves the use of a name for each of them.

The Appellants appeal the DBR decision on four grounds. First, they assert that G.L. 1956 § 3-5-11, facially

and in the manner of its enforcement by the DBR, violates the Appellants' rights secured under the First Amendment of the United States Constitution. The Appellants also argue that federal trademark laws preempt the DBR's statutory authority to regulate trade names. Third, they contend that the DBR decision violates the dormant Commerce Clause in Article I, Section 8 of the United States Constitution. Finally, the Appellants claim that the DBR decision constitutes the taking of a vested, federally recognized property right protected by the Fifth Amendment of the United States Constitution.

The Appellants now seek to have this Court overturn the DBR Decision. This Court has jurisdiction over the instant appeal pursuant to G.L. 1956 § 42-35-15(g). For the reasons set forth below, this Court affirms the DBR Decision and denies the appeal.

FACTS AND TRAVEL

Each of the Appellants is a Class A liquor licenseholder engaging in the retail sale of alcoholic beverages pursuant to G.L. 1956 §§ 3-2-2 *et seq.*, 3-5-1 *et seq.*, and 3-7-1 *et seq.* Under §§ 3-7-1 and 3-7-3, "a retailer's Class A license authorizes the holder to keep for sale and to sell at the place described beverages at retail and to deliver the beverages in a sealed package or container, which package or container shall not be opened nor its contents consumed on the premises where sold." The DBR has jurisdiction to regulate and control the sale of alcoholic beverages in Rhode Island pursuant to §§ 3-2-2, 3-5-1 *et seq.*, and 3-7-1 *et seq.* and §§ 42-14-1 and 42-14-2. Pursuant to § 3-5-11, the DBR may determine whether any group of one or more

Class A liquor licensees constitutes a "chain store organization" following an evidentiary hearing.

During the DBR hearing, the Appellants and the DBR filed cross-motions for summary judgment on whether the Appellants' use of their business names violated the provisions of G.L. 1956 § 3-5-11(b)(1)(vi).[1] For summary judgment purposes, the DBR and the Appellants stipulated that three (3) of the Appellants conduct business under the name "People's Liquor Warehouse," and eight (8) operate under the business name "Douglas Wine & Spirits." All eleven of these Class A licensees append different geographic locations to their names – for example, "Peoples Liquor Warehouse – Hopkinton." The DBR argued that summary judgment was proper because the Appellants' use of the same business name – distinguished only by a reference to geographic location – violates § 3-5-11(b)(1)(vi).

In support of their cross-motion for summary judgment, Appellants argued that the DBR's interpretation and application of § 3-5-11(b)(1)(vi) should fail because: (i) the DBR abused its discretion in enforcing the statute; (ii) the DBR's interpretation and application of § 3-5-11(b)(1)(vi)

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[1] G.L. 1956 § 3-5-11(b) provides, in pertinent part, that:

The term "chain store organization" is defined to include, but not limited to:

> (1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices with respect to the business conducted under such licenses, either directly or indirectly, or have any direct or indirect beneficial interest in the following practices: . . .
>
> > (vi) Any term or name identified as a chain or common entity.

is an unconstitutional and arbitrary infringement upon protected commercial speech; and (iii) § 3-5-11 violates the Commerce Clause and the Sherman Anti-Trust Act.

In the DBR Decision, the DBR Hearing Officer discussed legislative intent, statutory construction, and the mandates that the General Assembly imposed on the DBR with respect to the regulation of alcoholic beverages. The Hearing Officer declined to rule on the Appellants' constitutional claims, because she recognized that an administrative agency of the executive branch of government cannot determine the constitutionality of a statute at issue. *See Easton's Point Assoc. v. Coastal Resources Mgmt. Council,* 522 A.2d 199, 202 (R.I. 1987) (holding that administrative agencies are circumscribed from considering constitutional challenges during the course of a licensing or permit proceeding). She further explained that only the judicial branch can make such a determination. The Hearing Officer also noted that some of the Appellants had brought a constitutional challenge § 3-5-11 before the United States District Court for the District of Rhode Island. That case did not go to trial until approximately one month after the DBR released its decision in May, 2006.

According to the Hearing Officer, the General Assembly intended Title 3 of the Rhode Island General Laws (the Alcoholic Beverages statutes) to control, regulate, penalize, and monitor activities related to liquor. Section 3-2-2(a) of the Rhode island General Laws gives the DBR "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." Thus, the Hearing Officer determined that the prohibitions set forth in § 3-5-11 served to create uniformity and consistency in

the sales, advertising, supervision, and control of conduct of the business of selling alcohol beverages consistent with the purposes of the Alcoholic Beverages statutes. *See* G.L. 1956 § 3-1-5 (stating that "purpose [of Title 3] is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages"). The Hearing Officer held that the DBR had clear, unambiguous statutory mandates to determine whether Class A liquor licensees were operating as a "chain store organization" when they used a term or name identified as a chain or common entity.

In her decision, the Hearing Officer also determined that the DBR's interpretation of § 3-5-11 did not constitute an abuse of the agency's discretion and that the DBR did not selectively apply the statute to the Appellants. She held that, in DBR Bulletin 2005-2 of September 21, 2005, the DBR provided clear guidelines to Class A licensees who had the same or similar business name as another Class A retailer. The Bulletin explicitly stated that the DBR would not consider adding a location to an existing similar name a sufficient differentiation of name to satisfy § 3-51-1. Additionally, the Hearing Officer determined that the Appellants had defied the DBR mandate by merely appending locations to "Peoples Liquor Warehouse" and "Douglas Wine & Spirits." The Hearing Officer concluded that the Appellants' current names exemplify the exact rationale for requiring distinguishable names in order to prevent the misperception of a chain store or common entity. Thus, the Hearing Officer found that the names currently used by the Appellants were not easily distinguishable, appeared to be a chain or common entity, and therefore clearly violated § 3-5-11(b)(1)(vi). Although the DBR sought to revoke the Appellants' licenses, the Hearing

Officer imposed administrative penalties pursuant to § 3-5-11(b)(4) that included a 10-day suspension, a cease and desist order, an administrative penalty of $5,000 for each licensee, and the dissolution of the chain store organization.

The Director of the DBR approved the Hearing Officer's recommended decision on May 24, 2006. On or about June 16, 2006, the Appellants filed a timely Complaint of Appeal pursuant to § 42-35-15. This Court granted a Motion for a Stay of the Order pending further review. On September 28, 2004, the franchisor, Wine & Spirits Retailers, Inc., filed suit in the United States District Court for the District of Rhode Island, alleging that §§ 3-5-11 and 3-5-11.1 violated the franchisor's constitutional rights pursuant to the First Amendment, the Commerce Clause contained in Article I, Section 8, the Takings Clause of the Fifth Amendment and the Fourteenth Amendment's guarantees of Equal Protection. The franchisor requested a preliminary injunction against enforcement of the amended provisions, which the District Court denied. *See Wine & Spirits Retailers, Inc. v. Rhode Island,* 364 F.Supp. 2d 172 (D.R.I. 2005) (*Wine & Spirits Retailers (I)*). The franchisor thereafter appealed the District Court's denial to the United States Court of Appeals for First Circuit, which upheld the District Court's decision. *See Wine & Spirits Retailers, Inc. v. Rhode Island,* 418 F.3d 36 (1st Cir. 2005) (*Wine & Spirits Retailers (II)*). Subsequently, the franchisor amended the complaint to add three new store plaintiffs: the Douglas Wine & Spirits stores in Cumberland, Cranston, and North Providence.

On July 10 and 11, 2006, the District Court held a bench trial on the franchisor and stores' federal complaint. The District Court decision rejected all constitutional

arguments pressed by the plaintiffs in that action. (*See* Transcript of the District Court Decision in *Wine & Spirits Retailers, Inc. v. Greer,* C.A. 04-418T, July 19, 2006) Subsequently, the First Circuit affirmed the District Court's decision and found that the General Assembly had acted in the public interest in enacting G.L. 1956 § 3-5-11 and did not cross any constitutional boundaries. *See Wine & Spirits Retailers, Inc. v. Rhode Island,* 481 F.3d 1 (1st Cir. 2007) (*Wine & Spirits Retailers (III)*).

STANDARD OF REVIEW

The Court reviews contested agency decisions pursuant to the provisions of the Rhode Island Administrative Procedures Act, G.L. 1956 § 42-35-15(g). Section 42-35-15(g) provides that:

> [t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on the questions of fact. The court may affirm a decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In access of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

(5) Clearly erroneous in light of reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In reviewing an agency decision, the Court will not weigh the evidence upon which findings of fact are based, but will limit itself to an examination of the certified record in deciding whether the agency had substantial evidence to support its decision. *Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros,* 710 A.2d 680, 684 (R.I. 1998). The Rhode Island Supreme Court has defined "substantial evidence" as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." *Newport Shipyard, Inc. v. R.I. Comm'n for Human Rights,* 673 A.2d 457, 459 (R.I. 1996). Moreover, the Court will not substitute its judgment for that of an administrative agency as to the weight of the evidence on questions of fact, even if the Court "might be inclined to view the evidence differently and draw inferences different from those of the agency." *Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan,* 755 A.2d 799, 805 (R.I. 2000) (quoting *Rhode Island Pub. Telecomm. Auth. v. Rhode Island State Labor Relations Bd.,* 650 A.2d 479, 485 (R.I. 1994)). Therefore, the Court may reverse findings of fact only where an agency's factual conclusions are "totally devoid of competent evidentiary support in the record," *Baker v. Dep't of Employment and Training Bd. Of Review,* 637 A.2d 360, 363 (R.I. 1994) (quoting *Milardo v. Coastal Res. Mgmt. Council,* 434 A.2d 266, 272 (R.I. 1981)). Although the Court may freely conduct de novo review of an

agency's determinations of law, *Arnold v. R.I. DOL & Training Bd. of Review,* 822 A.2d 164, 167 (R.I. 2003) (citing *Johnston Ambulatory Surgical Assocs.,* 755 A.2d at 805), "the law in Rhode Island is well settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency." *In re Lallo,* 768 A.2d 921, 926 (R.I. 2001) (citing *In re Advisory Opinion to the Governor,* 732 A.2d 55, 76 (R.I. 1999); *Pawtucket Power Assocs. Ltd. Partnership v. City of Pawtucket,* 622 A.2d 452, 456 (R.I. 1993); *Defenders of Animals, Inc. v. Dept. of Envtl. Mgmt.,* 553 A.2d 541, 543 (R.I. 1989) (attributing great weight to an agency's construction of a regulatory statute when the provisions of the statute were unclear)).

ANALYSIS

I

The Weighing of Evidence by the Hearing Officer

The Appellants allege that that [sic] the Hearing Officer arbitrarily enforced G.L. 1956 § 3-5-11 and ask this Court to review the factual determinations of the Hearing Officer. Additionally, the Appellants assert that this Court should quash the DBR's interpretation and application of § 3-5-11 because the DBR abused its discretion and because the Hearing Officer should have used less drastic means to achieve compliance with the statute. Furthermore, the Appellants maintain that the statute does not articulate the harm resulting from the existence of a chain store organization or consumer perception of this existence. The Appellants also contend that because the DBR would allow the use of the full, legal name of the individual owner associated with the name of the l[illegible]ensee, the DBR has acted arbitrarily by allowing, for example, the

use of "Kathleen Haronian's Douglas Wine & Spirits-North Providence, Inc." but not "Douglas Wine & Spirits-North Providence." The Appellants allege that there is no difference in the two names, and, therefore, the criteria used by the DBR to enforce the statute are arbitrary.

In evaluating the facts of the case, the Hearing Officer found that DBR Bulletin 2005-2 had "clearly set forth guidelines to allow entities and individuals to distinguish their names to minimize the use of a chain or common entity." (DBR Decision at 14.) The Hearing Officer also held that the names currently used by the Appellants "are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of [G.L. 1956] § 3-5-11(b)(1)(vi)." (*Id.* at 15.) The Hearing Officer also considered the factual arguments asserted by the Appellants regarding alternative means of enforcement and rejected their proposals to add "independently owned and operated" and "not a chain store" to the business names, because the presence of any similar term or name identified as a chain or common entity among entities sends mixed messages to the consumer and is not a reasonable application of § 3-5-11(b)(1)(vi) prohibitions. (*Id.* at 18.)

"The law in Rhode Island is well-settled that an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency." *State v. Cluley,* 808 A.2d 1098, 1103 (R.I. 2002) (quoting *In re Lallo,* 768 A.2d 921, 926 (R.I. 2001)). "Use of the arbitrary and capricious standard means that reviewing courts will uphold administrative decisions ... as long as the administrative interpreters have acted within their authority to make such decisions and their decisions were rational, logical, and supported by substantial evidence." *Goncalves v. NMU*

Pension Trust, 818 A.2d 678, 682-683 (citing *Doyle v. Paul Revere Life Insurance Co.,* 144 F.3d 181, 184 (1st Cir. 1998)). Deference must also be given to an agency's interpretation even if the statute is ambiguous. *See Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket,* 622 A.2d 452, 456-457 ("Deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied.").

In matters of statutory interpretation, the Rhode Island Supreme Court has consistently held that the courts' "ultimate goal is to give effect to the purpose of the act as intended by the Legislature." *Silva v. Fitzpatrick,* 913 A.2d 1060, 1063 (R.I. 2007) (quoting *Webster v. Perotta,* 774 A.2d 68, 75 (R.I. 2001)). In order to effectuate the intent of the Legislature, courts must examine a statute "in its entirety and [attribute] to words their plain and ordinary meaning." *LePage v. Babcock,* 839 A.2d 1226, 1230 (R.I. 2004) (citing *Kent County Mental Health Center, Inc. v. Cavanaugh,* 659 A.2d 120, 122 (R.I. 1995)). Additionally, courts "shall not ascribe to the Legislature an intent to enact legislation that is devoid of any purpose, is inefficacious, or is nugatory." *Pullen v. State,* 707 A.2d 686, 691 (R.I. 1998) (quoting *Cocchini v. City of Providence,* 479 A.2d 108, 111 (R.I. 1984)). In cases of ambiguous statutory language, courts must then consider legislative intent. *Providence Journal Co. v. Rodgers,* 711 A.2d 1131, 1134 (R.I. 1998). In interpreting a legislative enactment, courts will "determine and effectuate the Legislature's intent" and "attribute to the enactment the meaning most consistent with [the Legislature's] policies or obvious purposes." *Park v. Ford Motor Co.,* 844 A.2d 687, 692 (R.I. 2004) (quoting *Dias v. Cinquegrana,* 727 A.2d 198, 199-200 (R.I. 1999)).

As noted by the DBR Hearing Officer, in Title 3 of the General Laws of Rhode Island – entitled "Alcoholic Beverages" – the Rhode Island General Assembly adopted a comprehensive statutory scheme to regulate many facets of the liquor industry within this state.[2] (DBR Decision at 12.) The provisions of Title 3 reflect legislative intent to control, regulate, penalize, and monitor activities related to alcohol. (*Id.*) Section 3-1-5, for example, states that "[t]his title shall be construed liberally in aid of its declared purpose which declared purpose is the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." (*Id.*) Furthermore, § 3-2-2 gives the DBR "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting, keeping for sale, and selling beverages." (*Id.*) Under § 3-5-1 *et seq.*, the DBR's supervisory authority extends to regulating licenses for the manufacture, sale or importation of alcoholic beverages. (*Id.*)

In light of the regulatory authority granted to the DBR, the DBR Hearing Officer analyzed the purpose and scope of the statutes at issue, §§ 3-5-11(b)(1)(vi) and 3-5-11.1 (prohibiting liquor franchises), in the context of Title 3's statutory scheme. (*Id.*) Section 3-5-11.1 states that the liquor franchise prohibition "promote[s] the effective and

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[2] The regulatory measures of Title 3 include: Chapter 4 – Transportation of Beverages; Chapter 5 – Licenses (including, state and local licensing provisions, limitations on the number of licenses that a licensee may hold, and manufacturer and wholesaler licenses); Chapter 6 – Manufacturing and Wholesale Licenses; Chapter 7 – Retail Licenses; Chapter 8 – Regulation of Sales; Chapter 9 – Adulterated Liquors; Chapter 10 – Taxation of Beverages; Chapters 11 and 12 – Penalties and Liabilities and Enforcement of Title; Chapter 13 – Malt Beverage Supplier-Wholesaler Agreements; and Chapter 14 – The Rhode Island Liquor Liability Act.

reasonable control and regulation of the Rhode Island alcoholic beverage industry and to help the consumer by protecting their choices and ensuring equitable pricing." (*Id.*) As noted by the Hearing Officer, this statutory scheme, coupled with the statutory definition of "chain store organization" under R.I. Gen. Laws § 3-5-11(b)(1)(vi), provides the legislative basis for Department to regulate the sale of liquor by limiting the names or other terms used by licensees identified as a chain or common entity. (*Id.*)

The Hearing Officer also correctly observed that the Rhode Island Supreme Court has consistently upheld the DBR's authority to regulate the liquor industry. (*Id.*) The Supreme Court confirmed that Rhode Island's Liquor Control Administrator – subsequently replaced by the DBR – serves as a "superlicensing board" with a broad and comprehensive power of review. *Hallene v. Smith,* 201 A.2d 921, 924 (R.I. 1964) (holding that *de novo* review is necessary to fulfill the legislative intent to "provide broad and comprehensive control by the State over the liquor traffic and to vest that control in an administrative body"); *Tedford v. Reynolds,* 141 A.2d 264, 267 (R.I. 1958); *Baginski v. Alcoholic Beverage Commission,* 4 A.2d 265, 268 (R.I. 1939). *See Clark v. Alcoholic Beverage Comm'n,* 170 A. 79, 80 (R.I. 1934). This authority derives in part from the general supervisory authority in matters related to liquor licensing vested in the DBR through §§ 3-1-5 and 3-2-2. *See Thompson v. Town of East Greenwich,* 512 A.2d 837, 842 (R.I. 1986). The General Assembly vested this authority in the DBR, because an "unsupervised system of local regulation" and a "lack of uniformity" in administering the law would result in "grave abuses which, as a matter of common knowledge, seriously [affect] public welfare."

Baginski, 4 A.2d at 267. The Rhode Island Supreme Court has stated that the legislature expressly provided for state control and has adopted a system for administering such control in the manner that it deems the most likely to be productive of the public good. *Bd. of License Commissioners v. Daneker,* 79 A.2d 614, 617 (R.I. 1951). This Court concurs with the Hearing Officer's analysis that §§ 3-5-11 and 3-5-11.1 create uniformity and consistency in the sales, advertising, supervision, and control of conduct of the business of selling alcoholic beverages consistent with the legislative intent of Title 3. (DBR Decision at 15.) Therefore, the DBR has the statutory mandate to determine whether Class A liquor licensees are operating as a "chain store organization" by using a term or name identified as a chain or common entity and determine an appropriate penalty for such prohibited activity. (*Id.*)

In DBR Bulletin 2005-2 and its December 15, 2005, amendment, the DBR promulgated guidelines for entities and individuals to distinguish their names to minimize the use of a chain or common entity. (*Id.*) As stated in the Bulletin, the DBR did not consider the adding of a location to an existing similar business name a sufficient differentiation. (*Id.*) Here, however, the Appellants proceeded to change their business names to increase their similarity to one another by adding locations in Rhode Island to identical business names – for example, Douglas Wine & Spirits – 44 and Douglas Wine & Spirits – Johnston. The Appellants argue that Paragraph 4 of the Bulletin allowed the use of a "full proper legal name," including their shared corporate name. However, this Court notes that the clear context of the example given in that paragraph indicates that the DBR intended to apply the "full proper legal name" standard to the name of an individual person,

not the name of a business entity. Here, the Appellants' name changes only serve to make their business names more similar and more indicative of a chain, thereby conflicting with the overall statutory intent.

As noted by the Hearing Officer, the DBR intended the criteria enunciated in the Bulletin "to inform its licensees and assist them in the enforcement of the statutory mandate while recognizing that some of the licensees had a personal stake in their businesses." (DBR Decision at 16.) Thus, the DBR allowed the "full proper legal name" of individuals to be attached to the name of the licensee. (*Id.*) Furthermore, the use of individual names clearly ties the license to an individual as distinguished from a business entity. The DBR Bulletin remains consistent with the requirements of § 3-5-11(b)(1)(vi), because consumers will more likely view a business entity name without reference to an individual's full proper name as a "chain or common entity." (*Id.*) Thus, the Appellants' current business names actually demonstrate the rationale for requiring distinguishable names in order to prevent consumer misperception that the Appellants' businesses were chain stores or common entities. (*Id.*)

The names currently used by the Appellants are not easily distinguishable, thereby violating § 3-5-11(b)(1)(vi). Therefore, the DBR Hearing Officer did not abuse her discretion in furthering Title 3's statutory scheme by finding that the Appellants violated DBR regulations. As the Hearing Officer noted, the names currently used by the Appellants "are not easily distinguishable, appear to be a chain or common entity and therefore, are clearly in violation of R.I. Gen. Laws § 3-5-11(b)(1)(vi)." (*Id.*) Upon a thorough examination of the entire record, this Court finds

that the Hearing Officer's findings were not arbitrary and capricious or marked by an abuse of discretion.

II
Appellants' Constitutional Claims

In addition to proceedings before the DBR, three of the Appellants in the instant matter – Douglas Wine & Spirits Cumberland, Douglas Wine & Spirits North Providence, and Douglas Wine & Spirits Cranston – filed suit against the State of Rhode Island in the United States District Court for the District of Rhode Island. In their federal case, the three Class A liquor licensees claimed that G.L. 1956 § 3-5-11(b)(1)(vi) violated their constitutional rights. The District Court rejected all the licensees' claims and held that § 3-5-11(b)(1)(vi) did not violate the licensees' rights. On appeal before the United States Court of Appeals for the First Circuit, the First Circuit affirmed the District Court decision and rejected all the licensees' constitutional challenges. These three licensees now join their fellow franchisees in appealing the DBR decision on largely identical constitutional grounds.

The doctrine of res judicata, or "claim preclusion," renders "a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or, that could have been presented and litigated therein." *Waters v. Magee,* 877 A.2d 658, 666 (R.I. 2005) (citing *Ritter v. Mantissa Investment Corp.,* 864 A.2d 601, 605 (R.I. 2005) (internal citations omitted)). Under res judicata, "[a] party defeated in one action cannot maintain a second action based on a ground which could properly have been, but was not, set forth and relied upon in the former action." *Johnston*

Ambulatory Surgical Assocs. v. Nolan, 755 A.2d 799, 808 (citing *El Gabri v. Lekas,* 681 A.2d 271, 275 (R.I. 1996) (internal citations omitted)). The doctrine "serves as an absolute bar to a second cause of action where there exists identity of parties, identity of issues, and finality of judgment in an earlier action." *Mills v. Toselli,* 916 A.2d 756, 757 (quoting *El Gabri,* 681 A.2d at 275 (internal citations omitted)). This Court will apply the preclusive effect of the res judicata doctrine to "all or any part of the transaction, or series of connected transactions, out of which the action arose." *El Gabri,* 681 A.2d at 276 (quoting Restatement (Second) of Judgments § 24 (1982)).

In contrast, the doctrine of collateral estoppel makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action. *Foster: Glocester Reg'l Sch. Comm. v. Bd. of Review,* 854 A.2d 1008, 1014 (quoting *E.W. Audet & Sons, Inc. v. Firemen's Fund Insurance Co. of Newark, New Jersey,* 635 A.2d 1181, 1186 (R.I. 1994) (internal citations omitted)). "Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *State v. Santiago,* 847 A.2d 252, 254 (R.I. 2004) (quoting *State v. Hie,* 688 A.2d 283, 284 (R.I. 1996)). Collateral estoppel requires "(1) that there [was] an identity of issues, (2) that the prior proceeding resulted in a final judgment on the merits, and (3) that the party against whom collateral estoppel is asserted [was] the same as or in privity with a party in the prior proceeding." *State v. Pacheco,* 763 A.2d 971, 980 (quoting *E.W. Audet & Sons, Inc.,* 635 A.2d at 1186). In order to meet the identity of issues requirement for preclusion, the issue: (1) must be identical to an issue

determined in an earlier proceeding; (2) must actually have been litigated in a prior proceeding; and (3) must necessarily have been decided. *State v. Godette,* 751 A.2d 742, 746 (citing *Hie*, 688 A.2d at 285).

In four decisions arising from the same issues, the federal courts have consistently decided against the Appellants' constitutional claims. Federal judges have heard and ruled on all issues raised here on appeal, and all parties to this appeal were either parties to one or more of the federal actions or in privity with one or more of the parties. Parties are in privity when "there is a commonality of interest between the two entities' [sic] and when they 'sufficiently represent' each other's interests." *Duffy v. Milder,* 896 A.2d 27, 36 (R.I. 2006) (quoting *Commercial Union Insurance Co. v. Pelchat,* 727 A.2d 676, 680 (R.I. 1999)). As fellow franchisees with identical legal interests in both the federal and state proceedings, all the Appellants in this case are in privity with the licensees who joined the franchisor in the federal complaint. In essence, the Appellants have had their day in court.

The appellants received a full federal bench trial before the District Court in Rhode Island. The District Court held that DBR policies banning the licensees' use of the same or similar business names pursuant to G.L. 1956 § 3-5-11(b)(1)(vi) did not violate any provisions of the United States Constitution. First, this ban did not implicate the licensees' First Amendment rights to freedom of speech or association by prohibiting common advertising and the use of a common name. (Tr. District Court Decision at 12.) Section 3-5-11(b)(1)(vi) of the Rhode Island General Laws does not prevent Class A licensees from using any name that they choose as long as it does not identify them as a chain store entity, since the statute does not restrict the

message that may be conveyed by the stores. The statute solely targets the licensees' collaboration in setting products and prices – the precursor to any common advertising. As noted by the Federal District Court,

> [t]here is no other reason to use a common name unless that's the case. Indeed, the evidence shows that this is precisely the means that the plaintiffs have used in order to circumvent the statutory prohibition against chain stores or franchise operations.

(Federal District Court Decision at 13-14.) The Federal District Court also noted that the use of a common name did not constitute protected commercial speech.

> [C]ommon advertising or the use of a common name, which has no independent expressive significance and amounts to nothing more than a means for carrying out the concerted activity, . . . is prohibited by statute. To put it another way, common advertising and the use of a common name not only concerns unlawful activity, it is part and parcel of the unlawful activity.

(Tr. District Court Decision at 17.) Thus, the Federal District Court held the use of that name would unlawfully mislead consumers, because a common name conveys the message that the licensees' stores are members of a chain.

On appeal, the First Circuit affirmed the District Court's findings and determined that these findings were not clearly erroneous. According to the First Circuit, the District Court's findings

> graphically illustrate why the use of a shared trade name in the retail liquor market by supposedly independent package stores poses an

> area of legitimate concern for a state that has abolished franchise and chain-store arrangements in that market. The findings, therefore, comprise a showing sufficient to underpin the restriction enacted by the Rhode Island General Assembly.

Wine & Spirits Retailers (III), 481 F.3d at 9. Thus, banning the use of common names does not impinge on any of the Appellants' First Amendment rights.

The District Court also held that the licensees "failed to come close" to showing that G.L. 1956 § 3-5-11(b)(I)(vi) violated the licensees' rights under the Commerce Clause of the United States Constitution. *See* U.S. Const. art. I, § 8. According to the District Court, G.L. 1956 § 3-5-11 does not facially discriminate against interstate commerce or out-of-state interests. (Tr. District Court Decision at 21.) "The statutory prohibitions against the sale of liquor by chain store organizations and/or franchise operations make no distinction whatever between in-state entities and out-of-state entities," because they apply across the board regardless of whether the chain store or franchisee is local or out-of-state. (*Id.*)

Furthermore, the District Court found no compelling evidence of discriminatory effect. During their federal trial, the licensees relied on *Walgreen Co. v. Rullan,* 405 F.3d 50 (1st Cir. 2005). In Walgreen, a commonwealth statute in Puerto Rico exempted existing pharmacies – roughly 92% of which were locally owned – from complying with a set of facially neutral statutory requirements. *Walgreen,* 405 F.3d at 55-56. The statute also allowed those "grandfathered" pharmacies to wield great influence in the enforcement of the statutory requirements as applied to new entrants. *Id.* Statistical data adduced at

trial "strongly indicate[d]" that the statute suppressed competition and favored local interests. *Id.* at 56. In the licensees' federal trial, however, the licensees failed to provide evidence that Rhode Island's prohibition on franchise and chain-store arrangements has had, or threatens to have, a debilitating or unfair impact either on competition in general or on out-of-state enterprises in particular. As noted by the Federal District Court, "Rhode Island licensees, and in particular local licensees, do not wield any power to delay or deny competition by franchise operations or chain store organizations either out-of state or in-state." (Tr. District Court Decision at 24.)

During the licensees' federal appeal, the First Circuit affirmed the District Court's findings regarding the alleged violation of the licensees' rights under the Commerce Clause. The First Circuit held that "the statutory scheme at issue here does not favor in-state interests at all." *Wine & Spirits Retailers (III),* 481 F.3d at 14. Furthermore, "a state regulation that burdens some interstate firms 'does not, by itself, establish a claim of discrimination against interstate commerce.'" *Id.* at 14-15 (quoting *Exxon Corp. v. Gov. of Md.,* 437 U.S. 117, 126 (1978)). Although the laws enacted by the Rhode Island General Assembly may have had a negative impact on Wine & Spirit's business model, this effect alone is not sufficient to show discriminatory effect. *Id.* at 15. According to the First Circuit, the plaintiffs merely showed that the statutes'

> neutral, evenhanded requirements . . . incidentally burden interstate commerce by precluding various methods of distribution in the retail liquor market. That is not enough. In order to invalidate the requirements, any such burden

> would have to be "clearly excessive in relation to the putative local benefits."

Id. (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). On the grounds of res judicata, this Court holds that the federal court findings regarding the alleged Commerce Clause violations are dispositive.

The District Court next addressed and rejected the licensees' claim that the statute constituted an unconstitutional taking of private property in violation of the Fifth Amendment. The District Court found that the licensees had no reasonable investment-backed property rights, because the licensees never had any "right" to engage in the franchise sale of liquor, since Rhode Island has prohibited chain stores from possessing Class A liquor licenses since 1933. (Tr. District Court Decision at 27.) Although the DBR's franchise division approved the franchise agreement, the District Court determined that

> the franchise division has no regulatory responsibilities with respect to liquor sales, and apparently was unaware of the prohibition against franchise sales of liquors, was unaware that under Rhode Island law franchise sales of liquor is treated differently from franchise sales of other products.

(*Id.* at 28.) Furthermore, the statute does not prohibit the licensees from operating liquor stores, so no regulatory taking occurred in this case. Finally, the District Court disposed of the licensees' taking claim by noting that the liquor industry is heavily regulated, and therefore "it [is] unreasonable to expect that the regulations governing liquor sales will not be amended from time to time when necessary to close loopholes or to further the goals of the regulation." (Tr. District Court Decision at 29.) Although

the First Circuit did not address the Fifth Amendment taking issue on appeal, this Court finds that on the basis of collateral estoppel, the Appellants' federal proceedings preclude this Court from ruling on this claim.

Finally, the District Court addressed the licensees' Equal Protection claims and determined that G.L. 1956 § 3-5-11 did not violate the licensees' constitutional rights. "The Rhode Island statute is economic legislation that does not employ suspect classifications or impinge on fundamental rights." (*Id.* at 30.) The licensees did not show that the statute discriminates against Class A retail liquor stores, because the statute treats all Class A licensees the same, and Class A licensees are not so similarly situated to businesses like wineries and beerpubs [sic] that the difference in treatment is arbitrary and irrational. (*Id.* at 30-31.) Additionally, multiple Class A liquor licensees using an identical family name do not violate the statute, because these stores do not "engage in common advertising, common pricing or any of the other concerted activities in which the [licensees] engage." (*Id.* at 33.) The District Court found that allowing individual licensees to use a common family name, but denying other stores to use names differentiated only by geography, was not arbitrary or irrational. (*Id.*) According to the District Court,

> Rhode Island did not act irrationally in prohibiting sales by chain store organizations and/or franchise operations; that as evidenced by the techniques utilized by plaintiffs in attempting to circumvent that ban, the prohibitions in Section 3-5-11 of concerted activities characteristic of chain store operations are necessary to implement that ban; that those prohibitions do not infringe on any of the plaintiffs constitutionally

> protected rights of speech and/or association; that the statute does not discriminate against interstate commerce; that neither the statute or [sic] the manner in which it is interpreted or enforced violates the plaintiffs right to equal protection; and that the ban does not constitute any taking of any property of the plaintiffs.

(*Id.* at 34). On appeal, the First Circuit applied rational basis scrutiny to the licensees' equal protection challenges to Rhode Island's economic legislation. *See Wine & Spirits (II)*, 418 F.3d at 53 (citing *Hodel v. Indiana,* 452 U.S. 314, 331 (1981)). Using rational basis scrutiny, the First Circuit upheld G.L. 1956 § 3-5-11, because the means chosen by the General Assembly were rationally related to a legitimate government purpose: "the promotion of temperance and for the reasonable control of the traffic in alcoholic beverages." *Wine & Spirits (III),* 481 F.3d at 13 (citing G.L. 1956 § 3-1-5). Accordingly, this Court is collaterally estopped from reconsidering the ruling of the federal courts on this matter.

CONCLUSION

After review of the entire available record, the Court holds that the Hearing Officer based her decisions on reliable, probative, and substantial evidence and her findings were not affected by error of law. The agency decision was not arbitrary or capricious, and they did not result from any abuse of discretion by the Hearing Officer. Thus, Appellants' substantial rights have not been prejudiced. Furthermore, the federal courts have rendered final judgment on the merits with regard to the Appellants' constitutional claims. Pursuant to the doctrines of res judicata and collateral estoppel, this Court will not disturb

the federal court decisions. For the reasons stated above, this Court affirms the Hearing Officer's decisions finding that Appellant violated G.L. 1956 § 3-5-11(b)(1)(vi).

Counsel for appellee shall prepare an appropriate judgment for entry.

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(4)

Supreme Court, U.S.
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No. 07-74

IN THE

Supreme Court of the United States

WINE & SPIRITS RETAILERS, INC., JOHN HARONIAN, DOUGLAS WINE & SPIRITS – CUMBERLAND, INC., DOUGLAS WINE & SPIRITS – CRANSTON, INC. and, DOUGLAS WINE & SPIRITS – N. PROVIDENCE, INC.,

Petitioners,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JEFFREY J. GREER, in his capacity as the Associate Director of the Department of Business Regulation, and UNITED INDEPENDENT LIQUOR RETAILERS OF RHODE ISLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

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August 30, 2007

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REPLY BRIEF

I. Rhode Island defends its statutory scheme by asserting a power to ban chain stores and franchises without justification.

Rhode Island's defense of its chain store ban is premised on the bizarre assertion that chain stores and franchised businesses are the legal equivalent of collusion between competitors. "The decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) makes it clear that the State can, and must, prohibit the 'business plan' touted by Petitioners." *Brief in Opposition*, p. 13. The State relies on *Giboney* for the unassailable proposition "'that states have constitutional power to prohibit competing dealers and their aiders and abettors from combining to restrain freedom of trade.'" *Id.*, *quoting* 336 U.S. at 495. *See also Id.* at p. 4 (describing the Douglas stores as an "anti-consumer chain store"). The State's view of chain stores and franchises as illegal anti-competitive forces in the marketplace establishes the crux of the present dispute. The Petitioners assert that national and regional retailers are entities competing in a free market against other retailers. Rhode Island, and

others, consider the very existence of such stores to violate of anti-trust principles because local retailers must compete with the greater marketplace efficiencies available to chains and franchises. The State ignores the fundamental difference between a successful family business that grows into multiple stores versus competing stores that collectively dominate a market and agree not to compete with each other. The State's failure to recognize this distinction explains why the State cites to successful practices of chains and franchises as evidence of wrongdoing. *See Brief in Opposition*, p. 7 ("Employees at all stores dress in an identical fashion, all wearing the 'Douglas' logo, without any store designation. (C.A. App. 107). Stores also provide shopping carts emblazoned with the Douglas logo, with no differentiation as to the individual store. (C.A. App. 107)").

By citing to *Giboney*, Rhode Island equates the expansion of a successful small business into a multi-store enterprise with an illegal effort to exclude competitors from the marketplace. This encapsulates the question presented here: Are chain stores and franchises *per se* equivalent to acts of collusion between competitors and therefore violative of antitrust law? Or, as stated by Rhode Island: "Whether a State may structure its retail liquor distribution system to outlaw chain stores and franchises?" *Brief in Opposition*, p. i.[1]

Such a dramatic expansion of the definition of illegal anti-competitive behavior, as proffered by Rhode Island and endorsed by the First Circuit, would permit states to go far beyond combating the forms of behavior traditionally subject to restriction.

> Arguments and combinations not to sell to or buy goods from particular persons, or to dictate the

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[1] It must reiterated that the police power asserted by Rhode Island and endorsed by the First Circuit was not limited to the retail liquor market, but is based on deference to the State's power to enact "economic legislation." App. 25.

> terms under which transportation will be supplied, are well recognized trade restraint practices which both state and national legislation can and do prohibit.

Giboney, 336 U.S. at 495. Such an expansion would empower states and municipalities to do as Rhode Island has done here and ban [national and regional retailers / chains and franchises] from their markets.

II. Rhode Island acknowledged below that promoting temperance is not a justification for banning chains and franchises.

In its *Brief in Opposition*, Rhode Island raises temperance as a justification for banning chain stores and franchises, but fails to disclose that it had disavowed temperance as a reason for the law during discovery. In responding to an interrogatory asking "If you contend that either §3-5-11, 3-5-11 (as amended) or 3-5-11.1 reduce the consumption of alcoholic beverages, state the basis for that contention", Rhode Island responded: "For purposes of this litigation, no." C.A. App. 298.

Rhode Island's effort to justify its restrictions on commerce and speech implicitly acknowledges its need to supply some valid justification beyond mere local protectionism for its restrictions. But justifications based on the Twenty-first Amendment are fact intensive and require careful scrutiny of the competing concerns. *See, e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Had the State offered temperance as a justification, Rhode Island would have been required to establish how the challenged provisions impact abusive consumption. No evidence or arguments about consumption were presented in either the courts below or in Rhode Island's *Brief in Opposition*.

Simply invoking the Twenty-first Amendment is not enough to save a statute from constitutional review.

> [T]he Court has held that state laws that violate other provisions of the Constitution are not saved

> by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996); the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982); the Equal Protection Clause, *Craig*[v. *Boren*, 429 U. S. 190,] 204–209; the Due Process Clause, *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971); and the Import-Export Clause, *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964).

Granholm v. *Heald*, 544 U.S. 460, 486-87 (2005). *See also, 324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 350 (1986) (rejecting New York's "unsubstantiated interest in protecting small retailers"). *Granholm* established that the States' "virtually complete control over how to structure the liquor distribution system" means that while the states are free to exclude alcoholic beverages altogether or undertake distribution themselves, once the State creates a private enterprise system of distribution it must regulate in accordance with the Commerce Clause. *Granholm*, 544 U.S. at 487-489.

III. This matter raises issues of national importance

Rhode Island, by asking the Court to "give no consideration" to Part II of the Reasons for Granting the Writ section of the *Petition*; stating that it "contains material and argument never submitted to either the District Court or Circuit courts" (*Brief in Opposition*, p. 10), betrays a misunderstanding of the criteria for issuing a writ of certiorari. Part II of the Reasons for Granting the Writ does not address the constitutionality of Rhode Island's statutory scheme; rather it explains the national import of the issues presented in the *Petition* through a survey of similar anti-national and regional retailer legislation from around the nation. This discussion of the national context of the impact of the First Circuit's decision was not presented to the courts below, but such a

discussion should not have been a relevant factor in the analysis by those Courts.[2]

IV. Standing was not an issue with respect to the claims presented in the *Petition*.

A. Commerce Clause claims

Rhode Island attempts to shoehorn Petitioner's entire dormant Commerce Clause argument into one theory that was presented below and rejected by the First Circuit for lack of standing. But Rhode Island overstates the First Circuit's holding. *Brief in Opposition*, p. 8 ("Quite significant are the rulings by the trial and Appellate courts that Petitioners lack standing to press the Commerce Clause claims they now seek to have this Court consider" (emphasis added)). The First Circuit held that the Petitioners lack standing to bring one theory under the Commerce Clause – the challenge to the residency requirement of §3-5-10.

Rhode Island's statutory scheme erects two absolute barriers to interstate commerce. First, §3-5-10 bars out of state entities from entering the Rhode Island market. Second, §3-5-11 (a) bars anyone with who does business in other states from also doing business in Rhode Island. While it is true that, as found by the First Circuit, the Petitioners, as Rhode Islanders, are not barred by §3-5-10's residency requirement; it is also true that the Petitioners are barred from the Rhode Island market by operation of §3-5-11 (a) because of the continued

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[2] To the extent any question exists as to whether the theories raised in the *Petition* were sufficiently raised below, the Petitioners notes that during the two day trial in this matter, both sides presented evidence and arguments concerning the dormant Commerce Clause claims. Further, parties are only required to adequately raise claims below, not specific arguments. *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (Noting the "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'", *quoting Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992)).

operation of the original Massachusetts Douglas Wine & Spirits stores.

The only theory for which the First Circuit found standing wanting was this one portion of the barrier to interstate trade argument related to §3-5-10's residency requirement. The First Circuit found sufficient standing to address Petitioners' Commerce Clause challenges to §§3-5-11 and 3-5-11.1. App. 18-25 ("The injuries of which the plaintiffs complain arise in consequence of Rhode Island's ban on franchise and chain-store arrangements, not in consequence of the residency requirements per se"). Petitioners have clear standing to challenge these provisions because they were not permitted to expand their existing Massachusetts operation into Rhode Island, because of §3-5-11's ban on chain stores. App. 86. The franchise model adopted by Petitioners as a way to comply with §3-5-11 has now been banned by §§3-5-11 (b) and 3-5-11.1. App. 86-87. Petitioners cannot do business in Rhode Island's retail liquor market unless they shed all interest in their out-of-state businesses. *See* §3-5-11(a) at App. 86.[3]

B. First Amendment claims

The Petitioners are banned from using their established trade name and from running joint ads. Any suggestion that they lack standing to challenge these restrictions on their speech is specious. Between the various Petitioners, they draft the contents of the ads, design the graphics for the ads, place the ads, and pay for the ads. Their speech is directly limited by the restrictions of §3-5-11(b)(1)(iii). App. 86. The Petitioners have been ordered to cease using the trade name by which they have identified themselves to their costumers for years. *See*

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[3] Indeed, the Petitioners can have no interest in any wholesale or retail businesses, whether related to alcoholic beverages or not.

§3-5-11(b)(1)(vi).[4]

Characterizing Petitioners' advertisements as conduct rather than speech directly conflicts with a recent decision of the Fifth Circuit, in which that Court did viewed a Texas ban on joint marketing by insurance companies and repair shops as a restriction on speech rather than a ban on conduct. *Allstate Insurance Company* v. *Abbott*, 2007 WL 2192895, *9 (5th Cir., decided August 1, 2007) (finding the joint marketing ban unconstitutional under the First Amendment).

V. A recent decision of the Fifth Circuit creates additional conflicts between that Circuit and the First Circuit

Rhode Island argues that conflicting decisions from other Circuits do not "involve[] action[s] by the State to regulate[] anticompetitive, collusive conduct as is present

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[4] Rhode Island incorrectly states:

> Petitioners mischaracterize the above list [of activates specified in §3-5-11(b)(1)] as establishing absolute prohibitions against the cited activity. A simple reading of the statute makes clear that is not correct - subsections (1)(a)-(f) simply provide indicia of chain store ownership that the State may consider when determining whether stores have violated the law.

Brief in Opposition, p. 2.

> Section 3-5-11 states:
>
> (a) Licenses . . . shall not be granted, issued, or transferred to or for the use of any 'chain store organization,' . . . (b) The term 'chain store organization' is defined to include, but not limited to: (1) Any group of one or more holders of Class A liquor licenses who engage in one or more of the following practices . . .

App. 86 (emphasis added). The Rhode Island Department of Business Regulation has also stated that the use of "similar names" standing alone constitutes a violation of §3-5-11. App. 76 (DBR Bulletin stating that "pursuant to the prohibitions set forth in R.I.G.L. §§3-5-11 and 11.1, the following practices are hereby prohibited . . . participation in coordinated or common advertising . . . existence of Class A licensees with the same or materially similar names" (emphasis added)).

here." *Brief in Opposition*, p. 29.[5] Rhode Island fails to note the recent decision by the Fifth Circuit addressing exactly that scenario and reaching the opposition conclusion than that reached by the First Circuit in the present matter.

On August 1, 2007, the Court of Appeals for the Fifth Circuit addressed dormant Commerce Clause and First Amendment challenges to a Texas statute that bared insurance companies from owning auto repair shops. *Allstate Insurance, supra*. Although the Fifth Circuit permitted Texas to regulate the economic relationship between insurance companies and repair shops, that court did not permit the restriction of their joint advertising and use of their trade name in the name of preventing "anticompetitive" associations.

The challenged Texas statute prohibited joint marketing programs by insurance companies and repair facilities. It also restricted the way in which repair facilities tied to insurance companies may use the insurer's name in their marketing. *Allstate Insurance*, 2007 WL 2192895, *9. The speech restrictions at issue in *Allstate Insurance* and in the present matter are strikingly similar: "Tex. Occ. Code §2306.006(3)[6] [] prohibits an insurer from engaging in a joint marketing program with a tied repair facility" *Allstate Insurance*, *9; RI Gen. L. §3-5-11 (b)(1)(iii) prohibits "[p]articipation in a coordinated or common advertisement with one or more liquor licensed business in any advertising media" App. 86; "Tex. Occ. Code §2306.006(6) [] prohibits allowing a tied repair facility to use an insurer's name in a manner different from that allowed for any other facility with which the insurer has a referral arrangement" *Allstate Insurance*, *9; RI Gen. L. §3-5-11 (b)(1)(vi) prohibits "[a]ny

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[5] Again, Rhode Island basis its argument on the unproven assumption that chain stores and franchises constitute illegitimate "collusive conduct."

[6] Section 2306.006 was subsequently renumbered as §2307.006.

term or name identified as a chain or common entity" App. 86.

Although both Rhode Island and Texas justified their restrictions on joint advertising and use of trade names as necessary to prevent "anticompetitive" behavior, the Fifth Circuit, unlike the First, required the State to justify those restrictions under First Amendment scrutiny. In the present matter, the First Circuit held that Rhode Island's ban on "coordinated or common advertisement" was not subject to First Amendment review because joint advertising constituted conduct, not speech. App. 8 ("The statute at issue here merely proscribes conduct – the launching of advertisements resulting from pre-agreed commercial strategies. Such a ban is not a ban on commercial speech").

Both Texas and Rhode Island argued that because the underlying business relationships have been prohibited, the speech targeted by their statutes constitutes illegal speech and is not protected under the first prong of *Central Hudson*. App. 13; *Allstate Insurance*, *9. While the First Circuit agreed with this argument with regard to the use of shared trade names (App. 11-14), the Fifth Circuit did not. The Fifth Circuit correctly held that commercial speech only falls outside of the protections of the First Amendment where the speaker "advertis[es] a product it was strictly prohibited by law from selling." *Allstate Insurance*, *9. Whether it is recommending a repair facility or selling alcoholic beverages, under the standard applied by the Fifth Circuit, commercial speech would not be excluded from constitutional protections if the commercial activity being advertised is legal and the advertisement is truthful.

Having found the commercial speech to be protected by the First Amendment, the Fifth Circuit then noted the failure of Texas to establish that its objectives could not

be achieved less restrictive means, such as the inclusion of clarifying language. *Allstate Insurance*, *11.[7]

VI. Rhode Island's recital of Equal protection Clause cases is not relevant to this *Petition*.

Pages 25 through 29 of the *Brief in Opposition* review a series of Equal Protection Clause cases related to liquor regulation. While the Petitioners did include an Equal Protection Clause/rational basis claim below, they have not pursued that theory in the *petition*. Therefore, Rhode Island's discussion of cases that have addressed rational basis challenges to liquor regulations has little relevance here.

CONCLUSION

For each of these reasons, the Petition for Writ of Certiorari should be granted.

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[7] In another case decided following the filing of the Petition, the U.S. District Court for the Northern District of New York held that New York's prohibition on attorneys using trade names that imply an ability to obtain results is unconstitutional under the *Central Hudson* analysis because the State failed to show that a disclaimer would be ineffective at preventing deception. *Alexander* v. *Cahill*, 2007 WL 2120024, *8 (N.D.N.Y, decided July 23, 2007).

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The First Amendment restricts the power of states to abridge the freedom of speech, including speech associated with commercial transactions. Rhode Island law prohibits lawful alcohol retailers from joining together in "coordinated or common advertisement[s]," or "marketing strategies," or from using any common "term or name" which might identify the stores as a common entity. R.I. Gen. Laws § 3-5-11(b)(iii)-(vi). May the state ban such expressive activity consistent with the First Amendment?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioners. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

PLF was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF has defended the freedom of entrepreneurs and commercial enterprises to express themselves. To that end, PLF has represented litigants and appeared as amicus curiae in many important cases involving commercial speech, including *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003); *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986); *City of Indio v. Arroyo*, 191 Cal. Rptr. 565 (Cal. Ct. App. 1983). PLF attorneys have also published articles on the free speech rights of those engaged in commercial enterprise. *See* Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *Rights Are a Seamless Web*, 26 Rutgers L. Rec. 5 (2002). PLF believes its public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

This Court should grant certiorari to clarify the scope of constitutional protection for expression relating to commercial enterprise. At present, it is unclear what expression receives

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

constitutional safeguards, and what level of protection it does receive.

These questions are especially important in connection with common brand identities and joint marketing schemes. Commercial speech doctrines developed in previous decades have focused on simple and direct advertising, but as marketing has become more sophisticated in recent years, and intertwined with classically protected forms of expression, such a focus has rendered the case law outdated. While those decisions involved direct descriptions of items for sale at particular prices, modern marketing techniques involve the development of complicated "brand identities" and "corporate personalities," in which consumers are not merely interested for the opportunity of engaging in transactions, but in which they and sellers combine in common expressive activities.

Certiorari should be granted to make clear that common branding and the use of coordinated identifying marks by commercial enterprises is constitutionally protected expression.

The court of appeals found that Petitioners lacked standing to assert violations of both their First Amendment rights and the First Amendment rights of their franchisees. Because standing is of concern particularly in this Court's consideration of certiorari, amicus also addresses the merits of the standing issue. Petitioners have standing to assert their own rights because they are not merely engaged in the nonexpressive activity of furnishing the materials of expression; rather, they are engaged in a common expressive enterprise with franchisees, which itself merits First Amendment protection.

Like businesses that operate highway billboards, *cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), or bookstores, *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425 (2002), Petitioners have expressive rights that are inextricably connected to their business activities. Petitioners also have standing to assert their franchisees' expressive rights. Such a

challenge is not properly characterized as an "overbreadth" challenge in the commercial speech context—as the court of appeals concluded, *see Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 49 (1st Cir. 2005). Instead, Petitioners have a "'commercial interest' in protected speech." *Metromedia*, 453 U.S. at 504 n.11. The expression by franchisees is protected expression, and even if Petitioners' activity is characterized as commercial speech, they have the right to challenge this law on the basis of its effects on the constitutionally protected expression of franchisees.

ARGUMENT

I

THIS COURT SHOULD GRANT CERTIORARI TO DECLARE THAT COMMON BRANDING IS CONSTITUTIONALLY PROTECTED EXPRESSION

As Petitioners note, this Court has yet to decide whether trade names and signs are commercial speech or noncommercial speech. Pet. for Cert. at 22. This is an important matter which deserves attention by the Court. Indeed, it indicates the vagueness and confusion that surrounds the entire distinction between commercial and noncommercial speech and that calls for wholesale revision of this area of the law.

Branding, or the use of trade logos, is valuable to businesses because it allows customers to predict the quality of services or goods that they can expect to receive from a business. Customers who pay more for a big label are paying for the convenience of not having to shop around for the best quality; they can tell from the brand name whether the product is a high quality, long-lasting, value-retaining product, or whether it is a low-quality, disposable item. Common branding therefore, while it does not explicitly propose a transaction, expresses "truthful, nonmisleading commercial messages" to

the public. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

This is particularly the case with regard to franchises. The ability to express important messages to the public is of the *essence* to the concept of a franchise—which in a large sense means the sale of an image or a communicative abstraction to franchisees. *See* Roger D. Blair & Francine Lafontaine, *Understanding the Economics of Franchising and the Laws That Regulate It*, 26 Franchise L.J. 55, 55 (2006) ("the main advantage of franchising . . . arises from its unique combination of (1) the chain's comparative advantages in creating brand recognition and capturing economies of scale in production, product development, and advertising with (2) the independent entrepreneur's drive and knowledge of the local market."). The old saying "the medium *is* the message" is very much true of franchises. *See* Roberta Rosenthal Kwall, *Regulating Trademarks on Exterior Signs: Should Local Law Trump the Lanham Act and the Constitution?*, 71 S. Cal. L. Rev. 1105, 1164 n.266 (1998) ("Trademark ownership entails control over a message that flows from producer to consumer. This message is short, but nonetheless rich with information.").

The "Ben & Jerry's" brand, for example, which has over 650 ice cream franchises in the United States, is not merely in the business of providing its franchisees with ice cream and other foodstuffs; nor is it in the business of selling a medium of expression to its dealers. Rather, it combines the two by allowing dealers and customers to participate in a *common expressive enterprise*: to share in a brand identity. It is, in a way, selling good will, which has value *solely* because it communicates to customers an idea of the quality of services and products available at the dealer. Customers know by the distinctive appearance of any Ben & Jerry's dealer what they can expect of a commercial transaction there, even if they have never entered that store before. Thus the franchise is by nature inextricably connected to the communicative content of the

logo or other brand identifying marks. The provision of licensing services *is* speech, because it is those services that allow the franchise owner to express a message to the public. That message, moreover, is not exclusively articulated by the franchisor or the franchisee, but by both.

The message expressed by common branding marks is *not* solely a message inviting a commercial transaction. *Cf. 44 Liquormart*, 517 U.S. at 501 ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) ("[T]he Government should not be able to suppress . . . truthful speech merely because it happens to appear on the label of a product for sale.").

Instead, as marketers have long understood, a "strong brand" image conveys "a value proposition that taps into consumer needs and leads to a relationship that drives purchasing decisions. A value proposition is a statement of the functional, emotional and self-expressive benefits delivered by a brand, and the strongest brands fuse all three." Jerre B. Swann, Sr., et al., *Trademarks and Marketing*, 91 Trademark Rep. 787, 796-97 (2001). Customers receive these messages and understand them not only as indicators of quality, but as part of an collective expressive enterprise in which they can participate. Thus, they can express themselves as well. *See* Virginia Postrel, *The Substance of Style: How the Rise of Aesthetic Value Is Remaking Commerce, Culture, and Consciousness* 103 (2003) (people "define [them]selves aesthetically . . . . *I like this* becomes *I'm like this*.").

A person wearing a T-shirt with a logo on it is often expressing a message more than mere brand loyalty. *See* Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 Notre Dame L.

Rev. 397, 397 (1990) ("ideograms that once functioned solely as signals denoting the source, origin, and quality of goods have become . . . valued as indicators of the status, preferences, and aspirations of those who use them."). "'[L]ifestyle' advertising is certainly a significant, and maybe even the dominant, part of modern advertising . . . . The instant one recognizes . . . that modern advertising is multidimensional, the task of designing coherent First Amendment policies for such advertising becomes problematic." Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 800 (1993).

Recurring to the previous example, the Ben & Jerry's corporation has established a reputation for social and political activism. It has carefully nurtured a corporate image that "focuses on community involvement and the firm's status as a socially responsible business." Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 Wash. & Lee L. Rev. 1625, 1645 (1993). A consumer who wears a tie-dyed Ben & Jerry's T-shirt, therefore, is choosing to express her association with the brand's image of "social conscience." Matt Haig, *Brand Royalty: How the World's Top 100 Brands Thrive & Survive* 168 (2004). Franchisees share in the same expression. The Ben & Jerry's Corporation invites potential franchisees to join in "our shared commitment to operate in a socially responsible way" and requires them to "activat[e] the brand and social mission through community involvement." Ben & Jerry's Website, Franchise Opportunities and FAQs.[2]

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[2] *Available at* http://www.benjerry.com/scoop_shops/franchise_info/ and http://www.benjerry.com/scoop_shops/franchise_info/faqs.cfm (both last visited Aug. 14, 2007).

The First Amendment clearly protects noncommercial conduct by which a person makes an aesthetic choice intended to express solidarity with others—such as growing one's hair long, *Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993), or wearing black armbands, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), or identifying clothing, *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459, 1461 (C.D. Cal. 1993), or a religious symbol as a necklace, *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997), or displaying a symbol or logo, *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002), or even simply standing or sitting, *see Clark v. Cmty. for Creative Nonviolence*, 468 U.S. 288, 306 (1984).

This is because people express themselves through identification with others. *See generally Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-70 (1995). They express a message of solidarity when they wear the same clothing or the same color or choose the same hairstyles. The First Amendment generally covers such conduct even though it does not express a "particularized message." *Id.* at 569. Certainly such expressive conduct deserves at least as much constitutional respect as the "erotic . . . expression" recognized by this Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 318 (2000). "In short, a cultural, ritualistic theory of communication values expressive activity for the kind of comment it makes about the relationships between culture and society, or between expressive forms. It values the ways in which 'experience is worked into understanding and then disseminated and celebrated.'" Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 Wake Forest L. Rev. 983, 1010 (2003) (citation omitted).

Yet the court below determined that because the Petitioners are not explicitly proposing a commercial transaction, their business of fostering collective branding and the use of shared identifying marks receives *no* protection under the First Amendment. *See Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 7 (1st Cir. 2007) (reaffirming earlier holding that "[t]he provision of advertising and licensing services is not speech that proposes a commercial transaction and therefore does not constitute commercial speech." *Wine & Spirits Retailers*, 418 F.3d at 49).

In other words, the display of a symbol is covered by the First Amendment, as is the conveyance of information such as an advertisement. So, too, is conduct intended to express solidarity with a group, conduct that does not convey a particularized message, or that conduct involves only an ineffable aesthetic experience. Finally, the proposal of a commercial transaction is protected by the First Amendment. But Petitioners' conduct, which *combines all of these things*, is not. This indicates the conceptual confusion at the center of today's commercial speech jurisprudence.

Moreover, in the increasingly complicated contemporary economy, commercial messages are routinely intertwined with noncommercial messages in a way that makes analysis by present commercial speech mechanisms virtually impossible. *See generally* La Fetra, *supra*, at 1230-36 (music videos, product placement, sponsorships, and other marketing tactics make it increasingly difficult to separate commercial from noncommercial speech).

The petition should be granted to redress this confusion and set forth clear, predictable standards for determining what expression receives and what does not receive constitutional protection.

II

THE PETITIONERS HAVE STANDING TO ASSERT A FIRST AMENDMENT VIOLATION

The Court of Appeals rejected Petitioners' free speech arguments on the grounds that they lacked standing. Since standing is an important consideration on a petition for certiorari, *see, e.g., Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (per curiam); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (mem) (dismissal of certiorari appropriate where parties lack standing), amicus will address the merits of Petitioners' standing arguments.

A. The Court of Appeals' Assertion That Expressive Conduct Is an "Act," Not Speech, Threatens the Expressive Freedom of Franchise Companies

The court of appeals held that Petitioners' conduct is an "act," and not "speech": that is, that Petitioners provide expressive services and materials, and do not engage in speech themselves. Therefore, Petitioners had no First Amendment rights at stake which they could assert here. "The provision of advertising and licensing services" the court declared, "is not speech that proposes a commercial transaction and therefore does not constitute commercial speech." *Wine & Spirits Retailers*, 418 F.3d at 49.

This conclusion is flawed for three reasons.

First, the distinction between a business which furnishes expressive opportunities and a business engaged in speech itself is not clear enough to allow for principled decision-making. This Court has frequently relied on the First Amendment to strike down restrictions on commercial pursuits that might be read as service industries or the sale of goods rather than communicative conduct. *See, e.g., Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936); *Minneapolis Star & Tribune Co.*

v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In an area of the law—commercial speech—that is already full of almost incomprehensibly narrow distinctions, adopting a legal rule that confines free speech rights to those who make use of communicative services, but excluding those who provide such services, would only further complicate matters. And with regard to franchises, which are in the business of selling participation in a common communicative enterprise, this is a particularly difficult line to draw. *Cf. Kasky v. Nike, Inc.*, 45 P.3d 243, 269 (Cal. 2002) (Brown, J., dissenting) ("the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries."). For a state to restrict an expressive enterprise such as a franchise licensing agreement is as much an interference with expression as it is a regulation of business conduct, and it "imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991).

Second, such a distinction finds no support in the Constitution. If anything, the text of the First Amendment counsels in favor of protecting businesses that furnish expression, since it prohibits any law that abridges the freedom of speech or of the *press*, thus explicitly referring to an industry engaged in the provision of communicative services. It makes no such subtle distinctions as the First Circuit made in this case. *See generally* Melville B. Nimmer, *Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 Hastings L.J. 639, 658 (1975) (noting different scope of protection under press and speech guarantees).

Third, the court of appeals' use of the Petitioners' status as a service provider to short-circuit their First Amendment claim, is a dangerous tactic which could undermine protection

of all commercial speech. All such speech is engaged in by businesses, and to bar Petitioners' claims on the grounds that they "merely" engage in a *business* that happens to communicate, would essentially eliminate all expressive freedom for businesses.

In *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976), this Court declared that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising," yet there must also be an expressive right on the part of those who help advertisers or others to express themselves.

Owners of theaters have standing to assert expressive rights even though they merely furnish the opportunity for film makers to express themselves, *see Playtime Theatres*. Book stores have First Amendment rights even though they sell books written and published by others. *Alameda Books*, 535 U.S. 425; *Wexler v. City of New Orleans*, 267 F. Supp. 2d 559, 565 (E.D. La. 2003) ("the First Amendment applies in this case because book selling is a form of expression."). Businesses that operate newspaper stands, or highway billboards, are protected under the First Amendment even if the newspapers or billboard displays contain messages by others; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Metromedia*, 453 U.S. 490. And, of course, newspaper companies themselves are protected under the First Amendment even if they print articles not produced by the newspaper company themselves; *Grosjean*, 297 U.S. 233; *Minneapolis Star & Tribune*, 460 U.S. 575.

It is not only the speaker herself who is protected under the expression clauses. If the provision of communication services or materiel can be deemed a mere business activity with no First Amendment protection, it is difficult to imagine what will remain of the expressive rights of media companies.

Moreover, as explained above, the nature of franchises is such that it is impossible to distinguish the franchisor's communicative conduct from the franchisor's sale of communicative opportunities or materials. A franchise license is a sort of communication in itself—permission to use a symbol which expresses a message about the franchisee, the content of which has meaning because of the *franchisor's* activities. Courts can no more distinguish the sale of permission to use common trade names and symbols from the expressive content *of* those symbols, than they can distinguish Paramount Pictures' sale of film stock from the images that appear on that film stock, or the newsprint sold by the Minneapolis *Star-Tribune* from the information that is printed on that paper. To characterize a franchise licensing agreement as only the sale of a service or product, not containing any constitutionally protected expression, is to make the same dubious distinction. This Court should take this opportunity to end such failed attempts at line-drawing.

B. Petitioners Have Standing to Raise Challenges to Restrictions on Expressive Rights of Its Franchisees

The court of appeal reaffirmed its earlier finding that Petitioners lacked standing to assert First Amendment rights on behalf of franchises whose expressive rights were being violated. *See Wine & Spirits Retailers*, 418 F.3d at 49; *Wine & Spirits Retailers*, 481 F.3d at 6 (finding "no reason to revisit" earlier rejection of standing). It explained that the overbreadth doctrine is inapplicable in commercial speech cases and therefore that the Petitioners could not assert that the challenged laws infringed on the free speech rights of others.

However, as this Court declared in *Metromedia*, 453 U.S. at 504 n.11, such a holding confuses the category of commercial speech with the category of parties "who have a 'commercial interest' in protected speech." This Court noted that it has

"never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others." If that were the law, "newspapers, radio stations, movie theaters and producers—often those with the highest interest and the largest stake in a First Amendment controversy—would not be able to challenge government limitations on speech as substantially overbroad." *Id.*

The same analysis applies here. Assuming *arguendo* that Petitioners are nothing more than a conduit or service industry assisting others to express themselves, Petitioners still have a commercial interest in the protected speech of franchisees, and therefore are able to allege that a law unconstitutionally infringes on speech by others, so long as they can establish some injury of their own which is fairly traceable to the government's actions. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioners have done so. *See Peoples Super Liquor Stores, Inc. v. Jenkins*, 432 F. Supp. 2d 200, 211 (D. Mass. 2006) (finding it "clear" that franchisor had standing to assert First Amendment rights of franchisee when law created "an insurmountable obstacle to the approval of th[e] franchise agreement."). The Rhode Island law has injured Petitioners' business of providing communicative opportunities, services, and materials. Standing thus established, they may also contend that the law unconstitutionally infringes on the expressive rights of others.

This Court has held that the overbreadth doctrine is not applicable to the commercial speech context, *see Bates v. State Bar of Ariz.*, 433 U.S. 350, 380-381 (1977),[3] but it has not

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[3] Moreover, the holding that overbreadth does not apply in commercial speech cases is questionable. *See generally* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 28-32 (2000). As Professor Post notes, the rejection of

(continued...)

rejected overbreadth challenges where a party, who alleges violation of a constitutionally protected right, asserts the infringement of expression by others. In *Bates*, a party whose commercial speech was regulated challenged the law on the grounds that it would restrict the commercial speech rights of others. But in *Metromedia*, the Court found that the owners of a billboard who had a commercial interest in expression on the billboards, did have standing "to raise the argument that billboards may, for some individuals or groups, be the only affordable method of communicating to a large audience." 453 U.S. at 504 n.11.

In *Preferred Commc'ns, Inc. v. City of L.A.*, 754 F.2d 1396 (9th Cir. 1985), *aff'd* 476 U.S. 488 (1986), the Ninth Circuit Court of Appeals relied on *Metromedia* to reject the argument that cable franchise operators could assert First Amendment rights in challenging a local government's rejection of a franchise license and refusal to allow the company to use government-owned poles for its cable lines. The court of appeal held that "cable operators do transmit programs produced by others," but that they "would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promotors [sic]." 754 F.2d at 1410 n.10. This Court affirmed, holding that cable franchises "partake[] of some of the aspects of speech and the communication of ideas as do

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[3] (...continued)
overbreadth doctrine in commercial speech cases rests on the assumption that commercial speech is less likely to be chilled by overly broad regulations than are other types of speech, but "the empirical basis of even such a tepid generalization is quite shaky." *Id.* at 32. *See also* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 386 (1980) ("The existence of a chilling effect depends as much on the potential penalty as on the motivation for the speech. A five dollar fine in a political speech case is probably less of a deterrent than a jail sentence—or disbarment—in a commercial speech case.")

the traditional enterprises of newspaper and book publishers," 476 U.S. at 494. Thus the fact that a business provides the material or conduit of expression by others does not mean that it has no First Amendment interest in that expression, or that it can be regulated in a way that restricts the flow of information.

Where, as in the case of franchises, the nature of the business is inseparably bound up with the communicative enterprise, it makes no sense to declare that the franchisor is engaged merely in an activity rather than in expression, and thereby to declare that the business lacks standing. Petitioners have standing to pursue this case.

III

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFUSING AND CONTRADICTORY PRECEDENT REGARDING COMMERCIAL SPEECH

Commercial speech doctrine is in such disarray that legal experts are unable to describe it with any degree of confidence. Indeed, in the past quarter century, this Court has not only "articulated three inconsistent tests for identifying 'commercial speech,' generating substantial uncertainty and confusion regarding the boundaries of commercial speech," Thomas C. Goldstein, *Nike v. Kasky and the Definition of "Commercial Speech"*, 2003 Cato Sup. Ct. Rev. 63, 70 (2003), but it has also provided a dizzying array of standards of scrutiny for commercial speech cases. *See* La Fetra, *supra*, at 1215-16.

In 1942, this Court declared that commercial speech received no First Amendment protection, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), then in 1976 that it was entitled to very serious protection. *Va. State Bd. of Pharmacy*, 425 U.S. at 761-62. Four years later, the court devised a four-part test for scrutinizing restrictions on commercial speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*,

447 U.S. 557, 564 (1980), then revised that test, *44 Liquormart*, 517 U.S. at 504. Depending on the speaker and the message conveyed, this Court has produced inconsistent rulings in similar cases. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (allowing regulation of commercial expression by attorneys); *Bates*, 433 U.S. at 384 (disallowing regulation of commercial expression by attorneys).

Worse yet, the Court has based its analysis on the alleged "social worth" of the speech at issue—contravening a cardinal First Amendment precept that speech should not receive lesser or higher protection depending on its content. *Compare Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 342, 348 (1986) (allowing restrictions on advertisements for legal gambling facilities), *with Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (disallowing restrictions on solicitations for charity). *See also* Alan Howard, *The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression*, 14 UCLA Ent. L. Rev. 47, 88 (2007) (noting how courts often "do precisely what the First Amendment forbids any government official from doing: judging the social worth of the speaker's underlying message" in order to exempt speech from "the general rule against content-based regulations.").

This Court has frequently acknowledged the confusion and vagueness that surrounds current commercial speech jurisprudence. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech."); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) ("the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps."). It has also recognized that "judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on

commercial speech." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). *See also 44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring) (noting that commercial speech cases are impossible to apply "with any uniformity."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) ("several Members of the Court have expressed doubts about the *Central Hudson* analysis."). "The commercial speech doctrine as currently applied by the Supreme Court and lower courts can lead to highly unpredictable results." La Fetra, *supra*, at 1215. Yet the law continues to avoid clear distinctions and definitions. *City of Cincinnati*, 507 U.S. at 419-20.

Lower courts find it exceedingly difficult to follow this Court's pronouncements on commercial speech, as well. *See, e.g., Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) ("the *Central Hudson* test is not easy to apply"); *accord, Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998); *Kasky*, 45 P.3d at 254-55. *See also American Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 867 (3d Cir. 1984) (Adams, J., concurring) ("The commercial speech doctrine, which offers lesser protection for commercial than for non-commercial communications, has been criticized almost since its inception for its failure to develop a hard and fast definition for this type of speech.").

Certiorari should be granted in this case to redress the confusing and overlapping standards applied to commercial speech.

CONCLUSION

The petition for certiorari should be *granted.*

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Respectfully submitted,

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